

Missouri Attorney General's Opinions - 1974

Opinion	Date	Topic	Summary
2-74	Nov 13		Opinion letter to the Honorable Joe D. Holt
3-74	Feb 22		Opinion letter to the Honorable James C. Kirkpatrick
4-74	Apr 11	PUBLIC RECORDS. CITIES, TOWNS & VILLAGES. CONSTITUTIONAL CHARTER CITIES.	Constitutional charter cities come within the provisions of the State and Local Records Law, Sections 109.200 et seq., V.A.M.S.
5-74	May 30		Opinion letter to the Honorable Joseph S. Kenton
8-74	Feb 14		Opinion letter to the Honorable William J. Cason
9-74	Apr 8	ELECTIONS.	Election challengers or watchers may not be appointed for an election conducted by a six-director school district except in St. Louis County. Where a school election is held jointly with an election for which challengers or watchers may properly be appointed, however, those challengers or watchers may challenge voters in the school election as well as the other election.
10-74	May 16	LIBRARIES. CITY LIBRARIES. COUNTY LIBRARIES.	Once a county library district is created by the county court, such district exists whether or not the voters adopt a tax levy for the district; and after such a district is created, a city library district may not be created within the county library district.
11-74	Mar 6	SCHOOLS. TEXTBOOK FUND. TEACHERS' FUND.	Any balance remaining in a school district's free textbook fund after textbooks are furnished to all eligible pupils as required in Section 170.051, RSMo 1969, as amended, may be transferred to the teachers' fund as required by Section 165.011, subsection 2, RSMo 1969, without conflicting with the restriction on commingling free textbook funds with the public school fund as set forth in subsection 7 of Section 170.051, Seventy-Sixth General Assembly, Second Regular Session.
12-74	Apr 8	SCHOOLS. ELECTIONS.	Residents on land which is part of a federal flood control project are entitled to vote in local school district elections.
13-74	Apr 26	RECORDER OF DEEDS.	County recorders of deeds are not authorized to make reports on real estate lien searches for the Farmers Home Administration (Form FHA-Mo 427-4, 4-2-71).
16-74	Mar 20	SCHOOLS. SCHOOL DISTRICTS.	The positions of director of a special school district and director of a six director district which is a component part of that special school

		CONFLICT OF INTEREST.	district are incompatible and one person may not hold both positions at the same time.
18-74	June 26		Opinion letter to the Honorable C. E. Hamilton, Jr.
19-74	Jan 24	SCHOOLS. SCHOOL FUNDS. STATE BOARD OF EDUCATION.	The State Board of Education may invest money accruing to or currently in the public school fund pursuant to Article IX, Section 5 of the Missouri Constitution without first securing an appropriation from the General Assembly, the State Board of Education may sell securities held by the public school fund before those securities mature, and it may sell those securities at less than their original cost to the fund if a portion of the interest received from the securities purchased with the proceeds is devoted to replenishment of the principal of the fund.
20-74	June 6		Opinion letter to Herbert R. Domke, M.D.
22-74	Mar 25		Opinion letter to the Honorable Donald L. Manford
23-74	Apr 2		Opinion letter to the Honorable John Twitty
24-74	June 7	ROADS & BRIDGES. STATE HIGHWAY DEPARTMENT. OFFICE OF ADMINISTRATION. COMMISSIONER OF ADMINISTRATION. DIVISION OF DESIGN AND CONSTRUCTION.	The State Highway Department is subject to the provisions of Sections 8.310 and 8.320, RSMo 1969, and accordingly must obtain the formal approval of the Commissioner of Administration before letting contracts for repair, rehabilitation, or construction of buildings and facilities. The State Highway Department is not required to obtain the formal approval of the Commissioner of Administration before obtaining architectural documents, supervising construction, and performing maintenance and inspection, provided, however, that in carrying out these activities it must conform to the reasonable procedures outlined by the Commissioner of Administration pursuant to his rule-making authority under Section 8.320, RSMo 1969. The repair, maintenance, operation, construction, and administration of highways, bridges, and tunnels by the State Highway Department are not subject to the requirements of Sections 8.310 and 8.320, RSMo.
25-74	Mar 7	CONSERVATION. OFFICE OF ADMINISTRATION. DIVISION OF DESIGN AND CONSTRUCTION.	The Department of Conservation is subject to the provisions of Sections 8.310, RSMo 1969, and Section 8.320, RSMo 1969, and accordingly must obtain the formal approval of the Commissioner of Administration before letting contracts for repair, rehabilitation or construction of state facilities. The Department of Conservation is not required to obtain the formal approval of the Commissioner of Administration before obtaining architectural documents, supervising construction, and performing inspection and maintenance, but its procedures in carrying out these activities must conform to the reasonable procedures outlined by the Commissioner of Administration, pursuant to his authority under Section 8.320, RSMo

			1969.
26-74	Mar 19		Opinion letter to the Honorable Christopher S. Bond
27-74	Mar 19		Opinion letter to the Honorable Christopher S. Bond
28-74	May 28	STATE UNIVERSITY. DEPARTMENT OF EDUCATION. OFFICE OF ADMINISTRATION. COMMISSIONER OF ADMINISTRATION. DIVISION OF DESIGN AND CONSTRUCTION.	The Department of Education must obtain formal approval of the Commissioner of Administration before letting contracts for repair, rehabilitation, or construction of facilities. It need not obtain formal approval before obtaining architectural documents, supervising construction, or performing inspection and maintenance, provided its procedures in carrying out these activities conform to the procedures the Commissioner of Administration has outlined pursuant to his rule-making authority under Section 8.320. The state universities, including the University of Missouri, have the power and authority to obtain architectural documents, let contracts for repair, rehabilitation or new construction of facilities, supervise construction, and perform inspection and maintenance of facilities without the approval of the Commissioner of Administration, once the necessary funds have been appropriated by the legislature for the performance of such activities. These institutions, however, are subject to the provisions of Section 8.320.
30-74	Jan 21	SCHOOLS. TEACHERS. COMPENSATION.	A school district may use school tax money to pay the membership fees and dues in service organizations for school administrators and teachers as part of their compensation. However, the payments may not begin during the term of an employment contract already in effect, but only at the beginning of a new contractual term.
32-74	Dec 18	RETIREMENT. COUNTY HEALTH CENTERS. STATE EMPLOYEES' RETIREMENT SYSTEM.	Employees of county health centers established under the provisions of Chapter 205, RSMo, are not eligible for membership in the Missouri State Employees' Retirement System.
33-74	Mar 14	LIBRARIES. COMPENSATION. CITY TREASURER. CONSTITUTIONAL LAW.	Article VII, Section 13 of the Constitution prevents the compensation of an elected city treasurer from being increased during the term of office of such city treasurer, notwithstanding the fact that Section 182.291, V.A.M.S., makes the city treasurer custodian of the funds of a city-county library district. A city-county library district has no authority to compensate the city treasurer for serving as custodian of the library district's funds.
35-74	May 20		Opinion letter to the Honorable Maurice Schechter
36-74	Sept 3		Opinion letter to Mr. Edwin Pruitt, Jr.
37-74	Feb 25	ELECTIONS.	A third class city located in a county which does not have a board of

		CITY ELECTIONS. CITIES, TOWNS & VILLAGES.	election commissioners may designate the number of election precincts within the boundaries of the municipality.
38-74	Jan 23	TAXATION (SALES & USE).	Only certain activities of sawmills and stave mills constitute manufacturing. The cutting of logs into various lengths and widths, the subsequent air or kiln drying of this lumber, and the planing of lumber for boards, without further finishing for specific product adaptations, do not constitute manufacturing. Other commercially useful by-products of this process, such as chips and sawdust are not manufactured articles. The foregoing activities are processing and are not encompassed by the sales tax exemptions of Section 144.030.3(3) and (4), RSMo 1969, that exempt from the imposition of sales or use tax machinery and equipment replacing equipment used directly for manufacturing or fabricating a product, or machinery and equipment purchased for direct use in manufacturing, mining or fabricating a product. In cases in which a substantial transformation of the original raw material occurs, such as the milling of bolts to produce barrel and heading staves, manufacturing occurs. The machinery used in such an operation is exempt from sales tax, pursuant to Section 144.030.3(3) and (4), RSMo 1969, if it is used directly in manufacturing a product which is intended to be sold ultimately for final use or consumption.
40-74	Jan 22		Opinion letter to the Honorable Ike Skelton
41-74	Sept 10	USURY. INTEREST. RETAIL CREDIT ACT.	Transactions characterized by the following are governed by the Retail Credit Sales Act: (1) the seller is a retail seller; (2) the buyer is a retail buyer; (3) the subject matter of the transaction consists of goods or services having a cash sale price of less than \$7,500; and (4) payment therefor, whether lump sum or periodic, is deferred. If the transaction is effected pursuant to a retail charge agreement, no separate charge may be assessed by the merchant for the buyer's failure to pay the amount due within the time stated; in that event, the delinquent amount becomes part of the unpaid balance subject to the permissible statutory monthly time charge. If the transaction is effected under a retail time contract and if the contract so provides, the merchant can assess a separate charge for the buyer's default on an installment due within the permissible statutory limits. Finally, the Missouri usury law does not prohibit merchants from assessing a reasonable charge for handling dishonored checks tendered for payment of goods purchased, provided the purchaser has prior notice of the merchant's policy. If, however, the check was tendered as payment of an amount due under a retail charge agreement or retail time contract, the amount or rate of such charge would be

			governed by the Retail Credit Sales Act.
42-74	Feb 8	GARBAGE. WASTE DISPOSAL. CITIES, TOWNS & VILLAGES.	With respect to the Solid Waste Management Law, Senate Bill No. 387, 76th General Assembly [Sections 260.200-260.245, RSMo Supp. 1973], cities and counties are required to provide for the collection and disposal of solid wastes including industrial wastes and may contract for such collection and disposal. Service charges may be imposed if not already imposed under some other law although such charges must be billed and collected directly by the cities or counties. General revenue of the city and federal revenue sharing funds may also be expended for such purposes.
42a-74	Mar 20		Addendum to Opinion No. 42
43-74	Jan 24	STATE UNIVERSITY. UNIVERSITY OF MISSOURI.	The Board of Curators of the University of Missouri may assume responsibility for operation of the Residence Center in Independence currently operated by Central Missouri State University and the Center may be operated as a part of the University of Missouri at Kansas City at the discretion of the curators.
45-74	Feb 25	PAROLE. NARCOTICS. CRIMINAL LAW. CRIMINAL PROCEDURE. CONTROLLED SUBSTANCE.	(1) The five-year additional parole period provided in Section 195.221, RSMo Supp. 1971, does not apply to persons convicted under Section 195.240, RSMo Supp. 1971, of selling, giving or delivering apparatus for the unauthorized use of controlled substances. (2) The parole of individuals convicted under Section 195.240, RSMo Supp. 1971, for selling, giving or delivering apparatus for the unauthorized use of a controlled substance should be governed by the provision of Chapter 549, RSMo 1969.
46-74			Withdrawn
47-74	Feb 19	FIREMEN.	A physical examination, in order to qualify as an examination raising the statutory presumption of evidence provided in Section 87.006, RSMo 1969, must be a medical examination given by a qualified physician which is directed to the detection of disease of the lungs or respiratory tract, hypotension, hypertension or disease of the heart, such that the examination, with reasonable medical certainty, will reveal the absence of disease of the lungs or respiratory tract, hypotension, hypertension or disease of the heart.
48-74	Feb 22		Opinion letter to the Honorable David Q. Reed
51-74	Jan 29	SCHOOLS. ASSESSMENTS. FLOOD CONTROL. ROAD DISTRICTS.	(1) Each county having federal flood control lands should assess the federal property in each school and road district in the county on the same basis as if it were privately owned, (2) the allocation of federal leaseback funds among the eligible districts should be based on the hypothetical tax yield of the federal property in each district, and not on a simple acreage basis, (3) the money should be distributed to the

			several districts by the county court as soon as the proper allocation has been computed, (4) a school or road district may bring a mandamus action against its county court to compel the distribution of the leaseback funds, and (5) a junior college district is eligible to receive federal flood control leaseback funds on the same basis as other school districts in the county.
52-74	July 12		Opinion letter to Mr. Charles O'Halloran
53-74	June 12		Opinion letter to Ms. Margie L. Butler
55-74	June 18		Opinion letter to the Honorable David Q. Reed
56-74	Apr 9		Opinion letter to the Honorable Donald L. Manford
57-74	May 3		Opinion letter to Mr. Edwin M. Bode
58-74			Withdrawn
62-74	Jan 9		Opinion letter to the Honorable Robert Fowler
63-74			Withdrawn
64-74	Feb 14		Opinion letter to the Honorable Charles M. LeCompte
65-74	Jan 16	MERIT SYSTEM. COMPENSATION. RULES & REGULATIONS.	The Personnel Advisory Board of Missouri has the authority to authorize, by rule, that appointments under the merit system may be made at a rate of pay higher than the minimum for the class depending on bona fide recruitment needs which may vary according to location.
66-74	Feb 1		Opinion letter to the Honorable Sue S. Shear
67-74	Mar 27		Opinion letter to the Honorable Robert Fowler
69-74	Feb 11		Opinion letter to the Honorable Larry R. Marshall
71-74	Mar 25		Opinion letter to the Honorable Christopher S. Bond
72-74	May 6		Opinion letter to the Honorable Wesley A. Miller
74-74	Jan 15		Opinion letter to the Honorable Charles J. Becker
75-74	Feb 19		Opinion letter to the Honorable Jack Gallego
77-74	Jan 7		Opinion letter to Mr. George M. Camp
79-74	Jan 16	TAXATION (CITY SALES).	A city may place restrictions upon the use of proceeds from a city sales tax by an ordinance which is referred to a vote of the people, but such restrictions may be altered by the governing body of the city, after the ordinance has been adopted, without a subsequent vote of the people.
80-74	May 2	PROBATION AND	The Board of Probation and Parole may properly refuse to allow its

		PAROLE.	clients to live in meretricious relationships during the term of their probation or parole and may likewise require that parolees or probationers sent to Missouri under the terms of the Interstate Compact for Supervision of Parolees and Probationers not live in such relationships.
82-74	May 6		Opinion letter to the Honorable Don Hancock
83-74	Jan 18		Opinion letter to the Honorable James I. Spainhower
85-74	June 7	SCHOOLS. STATE FUNDS. CONSTITUTIONAL LAW. STATE HIGHWAY COMMISSION. DRIVERS' EDUCATION COURSES.	It would be unconstitutional to appropriate revenue derived from highway users as an incident to their use or right to use the highways of the state for state approved courses in driver education in school districts.
86-74	Jan 24	HOSPITALS. NURSING HOMES. COUNTY HOSPITALS. COUNTY NURSING HOMES.	A nursing home operated by hospital trustees in conjunction with a hospital organized under Section 205.160, RSMo, is a "related facility" within the provisions of Section 1 of House Bill No. 1262, 76th General Assembly, and revenue bonds issued under such bill may be used for the construction, improvement, and repair of such combined hospital and nursing facility. Nursing homes which are governed by the county court under Section 205.375, RSMo, may be constructed and equipped by the issuance of revenue bonds under that section but not under House Bill No. 1262.
88-74	Sept 17	LIBRARIES. COUNTY LIBRARIES. CITY LIBRARIES. CONSTITUTIONAL LAW.	A city or county library district has authority to lease land for a library building. The leases may be for a term of years provided the current income and revenue and surplus from previous years on hand at the time the lease is executed are sufficient to provide for the payments called for by the lease.
89-74	May 28	AMBULANCES. CONSTITUTIONAL LAW. GOOD SAMARITAN LAW.	Section 20 of Senate Bill No. 57, 77th General Assembly, First Regular Session [Section 190.195, RSMo Supp. 1973], which purports to limit the civil liability of certain persons rendering emergency medical services, violates the provisions of Article III, Section 23 of the Constitution of Missouri and is, therefore, void.
90-74	Jan 8		Opinion letter to the Honorable Max Patten
92-74	Mar 29		Opinion letter to Dr. Arthur L. Mallory
94-74	Mar 29		Opinion letter to Mr. Charles A. Shaffer
95-74	Jan 25		Opinion letter to Harold P. Robb, M.D.

96-74	Jan 9		Opinion letter to the Honorable James A. Noland, Jr.
98-74	Mar 13	SUNSHINE ACT. PUBLIC RECORDS. AGRICULTURE. MILK SALES ACT. RULES AND REGULATIONS.	Subsection 2 of Section 4, C.C.S.S.B. No. 1, 77th General Assembly (Sunshine Bill), excludes the information required to be filed by the Commissioner of Agriculture Rules 2.06 and 2.07 from being “public records” open to the public. It is our further opinion that the legislature in subsection 5 of Section 4 of the “Sunshine Bill” intended to exclude the information filed pursuant to Rules 2.06 and 2.07 as “public records” open to the public.
99-74			Withdrawn
100-74	Jan 18		Opinion letter to the Honorable Larry R. Marshall
101-74	Feb 8	TAXATION. FIRE PROTECTION DISTRICTS.	Taxes may be levied by the governing body of a county on behalf of a fire protection district at the time required by law for levy of taxes for county purposes, whether or not the board of such district has certified its rate of levy to the county governing body by May 15. The tax may be imposed for a full year, although the district in question was formed after January 1.
103-74	Jan 23		Opinion letter to the Honorable Phil H. Snowden
105-74	Feb 13	DEPUTIES. COUNTY CLERKS. COMPENSATION.	The amount of compensation to be allowed a county clerk in a third class county to employ deputies and assistants under Section 51.450, RSMo 1969, is determined by compensation of the county clerk as provided in Section 51.300, RSMo Supp. 1973, and the compensation provided under Section 51.310, RSMo Supp. 1973, is not included.
107-74	Feb 14	BONDS. SCHOOLS. ELECTIONS. NOTICES.	The notice requirements for special school elections set out in Section 162.061, RSMo 1969, are satisfied by official notices published twenty-five and eighteen days before an election.
109-74	Mar 25	CRIMINAL PROCEDURE. CIRCUIT CLERK. SUNSHINE BILL.	1. All records pertaining to the case of a defendant who has been nolle prossed, dismissed, or found not guilty in the court in which the action is prosecuted, and not merely the name of the defendant, must be removed from the records of the trial court which are available to the public, and must be kept in separate records which are to be held confidential. Where possible, pages of the public records should be retyped or rewritten, omitting those portions of the records which deal with such a defendant’s case; however, where retyping or rewriting is not feasible because of the permanent nature of the record book, such record entries may be “blackened out” and recopied in a confidential record book. But the records of an appellate court which reverses a conviction and remands the case to the trial court are not to be closed, even if the case is nolle prossed, dismissed, or results in a finding of not guilty on remand. 2. The

			obligation to advise persons and agencies holding records pertaining to the case of a defendant who has been nolle prossed, dismissed, or found not guilty, rests upon those who are aware that such persons and agencies possess such records, and who are aware of the outcome of the case. Primarily this responsibility devolves upon the prosecuting attorney. 3. Law enforcement agencies are required to maintain confidential records of matters which are required to be closed, as well as the public records which such agencies maintain on all other matters.
111-74	Feb 4	CRIMINAL LAW. CRIMINAL PROCEDURE. CONTROLLED SUBSTANCES. NARCOTICS. DRUGS.	The expungement of records authorized by Section 195.290, RSMo Supp. 1971, requires the physical destruction of such records.
114-74	Mar 13	ELECTIONS. PRECINCTS. COUNTY CLERK.	With respect to cities and counties which are required to maintain a system of voter registration under Sections 114.011-114.146, RSMo Supp. 1973: 1. Absent a specific statutory provision to the contrary, a political subdivision conducting an election may have a polling place outside the boundaries of the political subdivision, provided that there is one polling place in each precinct in the political subdivision. 2. Any time two or more political subdivisions overlap within the same precinct and conduct elections on the same day, they must select a common polling place within the precinct, and the county clerk must provide the precinct registration records at the place so designated. If the political subdivisions involved cannot agree on a common polling place, the county clerk shall designate the polling place for the political subdivisions. 3. If two or more political subdivisions within an established precinct have an election on the same day and the districts do not overlap, the common polling place may, if necessary, be located beyond the political boundaries of one or more of the subdivisions; and to the extent that Section 162.371 or any other similar statute is to the contrary, it is deemed to have been implicitly repealed by Sections 114.011, 114.146. If the political subdivisions involved cannot agree on a common polling place, the county clerk shall designate the polling place for the political-subdivisions.
115-74	Mar 13	ELECTIONS. COUNTY CLERK.	Section 111.111, RSMo 1969, applies only to situations where a general, primary or special election of the state or a county <u>and</u> an election by a political subdivision are held on the same day.
116-74	Mar 13	ELECTIONS.	With respect to cities and counties which are required to maintain a

		CITY ELECTIONS. PRECINCTS. ELECTION JUDGES.	system of voter registration under Sections 114.011 - 114.146, RSMo Supp. 1973: 1. A city may designate election precincts pursuant to Section 114.116, RSMo Supp. 1973, without regard to the ward boundaries of such city, and may make the entire city one voting precinct; but a city located in more than one county must establish at least one election precinct in each such county. 2. A political subdivision encompassing more than one precinct, or parts of more than one precinct, must establish a polling place within each such precinct when conducting an election, except where the political subdivision is specifically entitled by law to consolidate precincts for that election and such consolidation will not interfere with the precinct system of voting in any other political subdivision which conducts an election on the same day. 3. In cases where there are not sufficient voters in a precinct to staff a polling place, an election conducted by less than the number of statutorily required officials is valid. If no one can be found in that part of a political subdivision within a precinct who will serve as an election official, election officials may be appointed for such precinct from elsewhere in the political subdivision.
117-74	Mar 13	ELECTIONS. PRECINCTS. HOSPITAL DISTRICTS. NURSING HOME DISTRICTS.	In cities and counties governed by Sections 114.011-114.146, RSMo Supp. 1973: 1. The boards of nursing home districts and the boards of hospital districts may not designate voting precincts. The precincts for elections of those political subdivisions are those established by the governing bodies of cities or by county courts pursuant to Section 114.116, RSMo Supp. 1973. The boards of nursing home districts and hospital districts may not consolidate such precincts. 2. When a political subdivision other than a county holds an election, absentee ballots are to be furnished to voters by the political subdivision.
118-74			Withdrawn
119-74	May 28		Opinion letter to the Honorable Vernon King
120-74	Feb 14	HOMESTEAD. CIRCUIT BREAKER. TAXATION (INCOME).	1. If one spouse who is eligible to receive a property tax credit under Sections 135.010 through 135.030, RSMo Supp. 1973, dies before the end of the calendar year for which the credit is to be claimed, the surviving spouse is entitled to credit only if such surviving spouse can personally fulfill the requirements for claiming a credit as an individual. Specifically, the surviving spouse must have attained the age of sixty-five on or before the last day of the calendar year for which the credit is claimed. 2. The personal representative of a deceased person who was eligible to claim the tax credit is entitled to receive the credit, if the deceased person survived to the end of the year for which the credit is claimed, unless the credit is properly

			claimed by the deceased person's surviving spouse.
121-74			Withdrawn
122-74	Feb 13		Opinion letter to Dr. Arthur L. Mallory
123-74	Jan 30	CONSTITUTIONAL LAW. GENERAL ASSEMBLY.	Under the provisions of Section 20(a) of Article III of the Missouri Constitution, the first extraordinary session of the 77th General Assembly will be automatically adjourned sine die at midnight, Friday, February 1, 1974, unless it has adjourned sine die prior thereto.
124-74	Feb 8	PARKING FACILITY. JOINT RESOLUTION. GENERAL ASSEMBLY.	The Joint Resolution (House Committee Substitute for Senate Concurrent Resolution, No. 2, House Journal First Extra Session, Sixteenth Day) of the Missouri General Assembly purporting to regulate parking facilities on the Capitol grounds and in the Capitol garage is invalid to the extent that it conflicts with the statutory authority of the Office of Administration to regulate parking upon the Capitol grounds but is valid to the extent that it regulates parking in the facility whose construction was authorized by House Bill No. 75 (Laws 1961, p. 568). Said resolution, not having the force and effect of law and being administrative in nature is not required to be approved by the Governor and is not precluded from adoption in a special session.
125-74			Withdrawn
126-74	Mar 1		Opinion letter to the Honorable Don Manford
127-74	Mar 18		Opinion letter to the Honorable Arthur T. Stephenson
128-74	May 24		Opinion letter to Mr. W. Clifton Banta, Jr.
129-74	Apr 4		Opinion letter to the Honorable Harry Rupert Stafford, Jr.
130-74			Withdrawn
132-74			Withdrawn
136-74	Mar 6	CITY OFFICERS. CITY HOSPITALS. CITIES, TOWNS & VILLAGES.	A member of the board of trustees of a city hospital of a third class city established pursuant to the provisions of Sections 96.150, RSMo et seq., may be removed under the procedures provided by Section 77.340, RSMo. Such trustees being city officers within the meaning of Section 77.400, RSMo, are within the conflict of interest provisions of Section 77.470, RSMo.
137-74	May 7		Opinion letter to the Honorable Ronald McKenzie
139-74	Apr 10		Opinion letter to the Honorable James N. Riley
140-74	Mar 27	COURTS. JUDGMENTS.	A foreign judgment filed for registration under the provisions of Supreme Court Rule 74.79 is not a final judgment required to be

		CIRCUIT CLERK. CIRCUIT COURT. FOREIGN JUDGMENTS.	abstracted under the provisions of Supreme Court Rules 74.76 and 74.77 until the court in which said foreign judgment is filed for registration shall enter a final judgment as provided under Rule 74.79.
144-74	Mar 6		Opinion letter to the Honorable Russell G. Brockfeld, Honorable Omar Schnatmeier, Honorable Fred Dyer and Honorable George P. Dames
147-74	Mar 5		Opinion letter to the Honorable Harold Dickson
148-74	Mar 6		Opinion letter to the Honorable W. O. Howard
151-74			Withdrawn
152-74			Withdrawn
154-74	Apr 23		Opinion letter to the Honorable Kenneth J. Rothman
156-74			Withdrawn
158-74	July 18		Opinion letter to Mr. Carl Noren
159-74	Apr 5		Opinion letter to the Honorable James I. Spainhower
160-74	Mar 18		Opinion letter to the Honorable Raymond Howard
161-74	Apr 4	MENTAL HEALTH COMMISSION. DEPARTMENT OF MENTAL HEALTH.	The new Department of Mental Health, to be established pursuant to Section 37(a), Article IV, Missouri Constitution and Senate Bill No. 1, 77th General Assembly, First Extra Session, will be under the control of the director of such department. The provision of Senate Bill No. 1, which purports to vest the control of such department in a State Mental Health Commission, is invalid.
162-74			Opinion letter to Mr. Robert L. James
163-74	June 13	FAIRS. STATE FAIR. COUNTY FAIRS. TAXATION (EXEMPTION). TAXATION (SALES & USE).	The gross receipts of the State Fair, derived from the sale of admission tickets, are subject to Missouri sales tax. The gross receipts from the sale of admission tickets to county fairs sponsored by fair associations, or by 4-H Extension Councils, are exempted from sales tax by Senate Bill No. 607, 77th General Assembly (1974). Sales of tickets to county fairs sponsored by other types of private organizations are exempted from sales tax by Section 144.040.1, RSMo, as amended by House Bill No. 1593, 77th General Assembly (1974), only if the sponsoring organizations are charitable organizations.
164-74	July 9		Opinion letter to Mr. James R. Spradling
167-74	May 6		Opinion letter to the Honorable James I. Spainhower
169-74	July 11		Opinion letter to the Honorable James F. McHenry

170-74	Mar 27		Opinion letter to the Honorable Keith Barbero
171-74	June 26		Opinion letter to the Honorable Frank Bild
172-74	Apr 5		Opinion letter to Harold P. Robb, M.D.
173-74	Apr 11		Opinion letter to Mr. Charles L. Arnold, Sr.
174-74	Apr 11	COMPENSATION. COUNTY OFFICERS. COUNTY BOARD OF EQUALIZATION.	Members of the county board of equalization established pursuant to Sections 138.010 and 138.020, RSMo, are entitled to statutory per diem unless they receive only salary as compensation for the office which they hold.
176-74	May 10		Opinion letter to the Honorable Jerold L. Drake
178-74	Apr 16		Opinion letter to Dr. Arthur L. Mallory
179-74	Sept 18	SCHOOLS. SPECIAL EDUCATION. RULES & REGULATIONS. PART-TIME ATTENDANCE. STATE BOARD OF EDUCATION.	Children may not be excused from the compulsory school attendance requirements of Section 167.031 unless they are "mentally or physically incapacitated," and Section 162.685(5), RSMo Supp. 1973, does not authorize the State Board of Education to adopt regulations permitting handicapped children to attend a public school special education program for less than a full school day and attend a nonpublic school for the remainder of the day, when the children in question are between the ages of seven and sixteen. However, handicapped children between the ages of seven and sixteen who have been excused from full-time attendance at public school because they are "mentally or physically incapacitated" may attend a nonpublic school for the remainder of the day if they wish. Children who are not between the ages of seven and sixteen may attend a public school special education program for less than a full school day because those children are not subject to the compulsory attendance law. Such children may attend a nonpublic school for the remainder of the day if they wish. State aid shall be paid on a pro rata basis for all special education students attending special education classes part-time regardless of age.
181-74	May 28		Opinion letter to the Honorable John D. Ashcroft
184-74	Apr 11	FUEL ALLOCATION BOARD.	Section 414.150, RSMo, which makes it unlawful for any person to offer fuel products for sale in any manner so as to tend to deceive the purchaser as to the nature, quality, and identity of the product or under any name except the true trade name is not applicable to fuel allocations made by the Missouri Fuel Allocation Board.
185-74	May 1		Opinion letter to Mr. Bert Shulimson
189-74	Apr 25	APPROPRIATIONS. CONSTITUTIONAL	Language in an appropriation bill for "personal service" such as Section 16.070, CSHB No. 1016, passed by the 77th General

		LAW	Assembly, which provides "Any monies accrued due to vacancies or delayed pay increases must be lapsed." is legislating in an appropriation bill and is unconstitutional in violation of Article III, Section 23, Constitution of Missouri. Such language is severable and the appropriated sums for personal service are valid.
190-74	Apr 25	APPROPRIATIONS. CONSTITUTIONAL LAW. FISCAL AFFAIRS COMMITTEE. COMMISSIONER OF ADMINISTRATION	The provision in the Omnibus State Reorganization Act of 1974 (S.B. 1) which purports to give authority to the Committee on State Fiscal Affairs and the Commissioner of Administration to "alter" the purpose of appropriations is unconstitutional in violation of Article IV, Section 28 and Article III, Sections 21 through 33, Constitution of Missouri. Similar language in appropriation bills is also unconstitutional in violation of Article III, Section 23, Constitution of Missouri.
192-74	Apr 26	NARCOTICS. CONTROLLED SUBSTANCES. CONSTITUTIONAL LAW. PENAL LAWS. SCHOOLS.	The proceeds of the sale of any property forfeited to the state pursuant to Section 195.145, RSMo 1969, and sold at public or private sale, should, after payment of the cost of storage, if any, and the cost of the proceedings of the case, be paid into the county school fund.
193-74	July 26	STATE UNIVERSITIES. JUNIOR COLLEGES. SCHOOLS. COORDINATING BOARD FOR HIGHER EDUCATION. CONFLICT OF INTEREST.	The positions of member of the Coordinating Board for Higher Education and board member of a Missouri Junior college district or trustee or regent of a state university are incompatible and one person may not hold both positions at the same time.
195-74	May 28		Opinion letter to the Honorable Phil Snowden
196-74	May 1		Opinion letter to the Honorable Jack E. Gant
200-74	May 13	LICENSES. MOTOR VEHICLES. CRIMINAL LAW. DIRECTOR OF REVENUE.	A person whose driver's license has expired can be placed under suspension or revocation by the Director of Revenue upon the accumulation of the necessary points; and such a person, or a person whose license expires subsequent to the issuance of a revocation or suspension, is subject to prosecution under Section 302.321, RSMo Supp. 1973, if apprehended while driving during the period in which the suspension or revocation is in effect.
201-74	May 10		Opinion letter to the Honorable Michael L. Shortridge
202-74	May 10	BOWLING. BILLIARDS.	Charges for the use of billiard, pool, bowling, and similar amusement or recreational facilities are subject to Missouri state sales tax under

		POOL TABLES. TAXATION (SALES & USE).	Section 144.020, subsection 1(2), RSMo Supp. 1973 (Senate Bill No. 407, 77th General Assembly).
203-74	May 16		Opinion letter to the Honorable Robert T. Johnson
205-74	June 5		Opinion letter to the Honorable James Millan
206-74	May 20		Opinion letter to the Honorable Jack E. Gant
207-74	Apr 19		Opinion letter to the Honorable Robert E. Young
208-74	May 10		Opinion letter to Mr. B. W. Robinson
209-74	May 14		Opinion letter to the Honorable James C. Kirkpatrick
212-74	May 10	APPROPRIATIONS.	The letters "FTE" used in appropriations for personal services in bills passed by the 77th General Assembly do not affect or restrict the authority of governmental units, to whom appropriations are made, to expend the sums appropriated for "personal services" for the number of employees provided for by general statutes or the number deemed necessary, and proper by such governmental unit if the number of employees is not provided for by general statutes.
213-74	May 10	APPROPRIATIONS.	The term "estimate," found in C.C.S.H.B. No. 1004, 77th General Assembly, and other appropriation bills, is merely informational and has no legal effect.
214-74			Withdrawn
215-74	June 12	GOVERNOR. MENTAL HEALTH.	(1) The Mental Health Commission, and not the Governor, has authority to appoint the director of the Department of Mental Health, and (2) the Governor and the Mental Health Commission are each authorized to remove the director of mental health.
216-74			Withdrawn
217-74	May 10	APPROPRIATIONS.	The Governor has the authority to establish the level of salary of the director of the Department of Transportation and such funds appropriated to the department, for personal service, may be utilized to supplement the amount appropriated for the salary of the director.
218-74	May 23		Opinion letter to the Honorable James C. Kirkpatrick
220-74	June 11	MERIT SYSTEM. STATE EMPLOYEES. DEPARTMENT OF SOCIAL SERVICES.	In addition to the Director of the Department of Social Services and his secretary, and the division directors and their secretaries, and three additional positions in each division, all positions included in the exemptions listed in Section 36.030.1, RSMo, are excluded from the requirements of Chapter 36, RSMo.

221-74	June 18	REORGANIZATION ACT.	Under the provisions of Senate Bill No. 1, 77th General Assembly, First Extraordinary Session, where a division is created by statute and an existing agency is transferred to it by "Type I" transfer, the department head has the power that he would if the agency were transferred by "Type I" transfer to the department, except he may not abolish the division and he may not assign the function of the previously existing agency to another division in the department.
222-74	June 26		Opinion letter to Mr. G. L. Donahoe
223-74			Withdrawn
225-74	Dec 31	LAGERS. PENSIONS. RETIREMENT. POLITICAL SUBDIVISION. COUNTY HEALTH CENTER.	A county health center established pursuant to Chapter 205, RSMo 1969, is not a political subdivision within the meaning of Section 70.600(19), and that the board of trustees of a county health center cannot establish a plan for the pensioning of its officers and employees separate and apart from that provided in Chapter 70, RSMo, providing for the Missouri Local Government Retirement System.
227-74	June 13		Opinion letter to the Honorable James G. Lauderdale
228-74	June 10		Opinion letter to Mr. James R. Spradling
229-74	June 18		Opinion letter to the Honorable Kenneth J. Rothman
230-74	Aug 23		Opinion letter to Mr. James L. Wilson
235-74	June 18	REORGANIZATION ACT. DEPARTMENT OF NATURAL RESOURCES.	(1) The positions of executive secretary of the Air Conservation Commission, Clean Water Commission, and Inter-Agency Council for Outdoor Recreation are abolished and the director of the Department of Natural Resources shall cause the policies of these boards to be executed and directors of staff shall be appointed by the director of the department to service these agencies, (2) there is no position comparable to "executive secretary" for the Soil and Water Districts Commission and the director of the department shall cause the policies of this commission to be executed and shall appoint a director of staff to service the commission; (3) the director of the department shall cause the policies of the Oil and Gas Council to be executed and shall appoint a state geologist who shall serve as director of staff to the council; (4) the position of director of the Land Reclamation Commission continues and the commission shall select such director who shall be the "director of staff"; and (5) none of the above positions are merit positions under Chapter 36, RSMo.
236-74	June 13	CREDIT UNIONS. REORGANIZATION ACT.	The Director of the Division of Credit Unions in the Department of Consumer Affairs, Regulation, and Licensing is not required to meet the qualifications expressed in Section 370.100, RSMo 1973 Supp.

237-74			Withdrawn
238-74	Sept 3		Opinion letter to the Honorable Frank Bild
241-74	Sept 3		Opinion letter to Harold P. Robb, M.D.
242-74	Sept 17	DENTISTS. DEATH CERTIFICATES. PHYSICIANS. DOCTORS.	(1) Dentists are not authorized to conduct a complete physical evaluation of a patient and (2) dentists are not physicians within the meaning of Section 193.140 authorizing physicians to certify cause of death on a death certificate.
244-74	July 11		Opinion letter to the Honorable Thomas W. Shannon
245-74	July 12		Opinion letter to Mr. Robert L. James
246-74	June 26		Opinion letter to the Honorable Christopher S. Bond
247-74	July 11		Opinion letter to the Honorable William L. Mauck
249-74			Withdrawn
253-74	Oct 31		Opinion letter to the Honorable A. J. Seier
254-74	Sept 16		Opinion letter to the Honorable Donald L. Manford
255-74	July 31		Opinion letter to Mr. Jack K. Smith
259-74	July 19	ELECTIONS. JUDGES. NOMINATIONS. CANDIDATES.	The judicial district committees of the twentieth judicial circuit are composed of the chairman and vice chairman of the county committees of Franklin, Gasconade and Osage Counties and if there are parts of cities included in the twentieth judicial circuit, the ward committeemen and committeewomen from the wards in whole or in part in such parts of such cities are also included as members of the judicial district committee of the twentieth circuit.
261-74	Sept 18		Opinion letter to Mr. J. E. Riney
262-74	Sept 30	RESORTS. LIQUOR. LICENSES.	Under the provisions of Senate Bill No. 348, Second Regular Session, 77th General Assembly, which amends Section 311.095, RSMo, the Supervisor of Liquor Control cannot issue a retail by the drink liquor license to the lessee of the restaurant premises of a motel-restaurant combination and a separate retail by the drink license to the owner of the motel premises of a motel-restaurant combination.
263-74	July 19	ELECTIONS. JUDGES. NOMINATIONS. CANDIDATES.	The judicial district committee of the 23rd Judicial Circuit of each political party shall be composed of the chairman and vice chairman of the county committees of Washington and Jefferson Counties and the chairman and vice chairman of the 122nd, 123rd and 124th legislative districts. The nominations may be made by the committee members holding such offices between August 13, 1974 and the third Tuesday in August 1974, and if not made by such committee

			members, may be made by the committee members elected the third Tuesday in August 1974.
265-74	July 11		Opinion letter to Dr. Arthur L. Mallory
266-74	Nov 1		Opinion letter to Mr. Charles M. Kiefner
268-74			Withdrawn
269-74	Sept 16		Opinion letter to the Honorable William B. Waters
270-74	July 25		Opinion letter to the Honorable William Dick Fickle
272-74	Aug 21		Opinion letter to the Honorable James A. Noland, Jr.
275-74	Dec 5		Opinion letter to Mr. Lawrence Graham
276-74	July 26		Opinion letter to the Honorable James F. Conway
278-74	Aug 21		Opinion letter to Mr. James Wilson
279-74	Nov 21		Opinion letter to the Honorable Dan Bollow
281-74	Oct 31	PENSIONS. RETIREMENT. JUVENILE OFFICERS. STATE RETIREMENT SYSTEM.	<p>1. Juvenile officers who are paid in whole or in part out of state appropriations are entitled to membership and prior membership credit in the Missouri State Employees' Retirement System. Deputy juvenile officers are not entitled to membership or prior membership credit in the Missouri State Employees' Retirement System.</p> <p>2. Such juvenile officers are entitled to membership in the Missouri State Employees' Retirement System on the full amount of their salaries.</p>
283-74	Oct 22		Opinion letter to the Honorable Robert O. Snyder
286-74	Oct 25		Opinion letter to the Honorable Hardin C. Cox
287-74	Nov 14	LIENS.	Section 429.010 (S.C.S.H.S. House Bill No. 1251, 77th General Assembly, Second Regular Session) with respect to mechanic's liens requires the "NOTICE TO OWNER" to be printed in "ten point bold type." The normal typewriter is not capable of printing a typeface in "ten point bold type." The underlining of type which is not "bold" or boldface does not make it so. There is no requirement that lien waivers be provided a consumer by an original contractor as a condition precedent to the filing of a mechanic's lien.
289-74	Oct 18	ELECTIONS. ELECTION CLERKS. ELECTION JUDGES.	(1) A person may be designated to serve as an election judge or clerk in a precinct in which he does not reside if the election authority cannot find sufficient qualified persons within the precinct to act as election officials, and (2) persons so selected can vote an absentee ballot if the precinct in which they serve as election judges or clerks

			is located outside the county where they are registered to vote but not otherwise.
290-74	Dec 6	DEPARTMENT OF MENTAL HEALTH. SPECIAL EDUCATION. STATE BOARD OF EDUCATION.	(1) Sections 162.670 et. seq., RSMo Supp. 1973, give responsibility for providing special educational services for all handicapped and severely handicapped children to local school districts, special school districts and the State Board of Education. The Department of Mental Health has the duty to assure that children in its programs are receiving special educational services, either by providing them under the provisions of Chapter 202, RSMo, or by procuring them from the responsible educational agency; (2) The Department of Mental Health may use state appropriated funds to provide transportation for its patients to and from special educational programs, whether those programs are provided by the Department of Mental Health itself, by a school district or special school district, by the State Board of Education, or by a public or private agency under contract; and (3) Federal developmental disability funds may be used, with the approval of the Governor's Council on Mental Retardation and Other Developmental Disabilities, for the transportation of developmentally disabled students to and from special education programs for the handicapped and severely handicapped.
291-74			Withdrawn
292-74	Sept 16		Opinion letter to the Honorable Larry R. Marshall
297-74	Sept 5		Opinion letter to the Honorable James C. Kirkpatrick
298-74	Sept 16		Opinion letter to Mr. William R. Kostman
300-74			Withdrawn
301-74	Sept 27		Opinion letter to Mr. Robert L. James
302-74	Sept 17	CONSTITUTIONAL LAW. SCHOOLS. BONDS. TAXATION (SCHOOLS)	Neither the Missouri Constitution nor the United States Constitution forbids the two-thirds majority needed for tax and bond elections under Article X, Section 11 (c) and Article VI, Section 26 (b) of the Missouri Constitution.
303-74	Oct 28		Opinion letter to the Honorable Garnett A. Kelly
305-74	Sept 17 Amended Jan 28, 1975	JUDGES. PENSIONS. MAGISTRATES. RETIREMENT.	A magistrate judge over the age of sixty-five who has served as a magistrate judge or as a justice of the peace in the state of Missouri for a period of time totaling an aggregate of twelve years and who after September 28, 1971 ceases to hold his office as magistrate judge by voluntary resignation is entitled to retirement pay equal to fifty percent of the compensation provided by law at the time of his

			retirement for the judges of the highest court the retired judge served as a full-time judge, to be paid monthly during the remainder of his life, said compensation to begin from the date of his resignation as magistrate judge.
306-74	Nov 21		Opinion letter to the Honorable Frank G. Mack
307-74	Oct 8		Opinion letter to the Honorable Ed Bohl
308-74	Oct 23	BALLOTS. ELECTIONS. ELECTION JUDGES. VOTING MACHINES.	Ballot cards used in an electronic voting machine should be initialed by two judges of opposite politics. However, if ballots are cast which are not initialed by the election judges, such ballots are to be counted if otherwise in compliance with legal requirements.
312-74	Sept 23		Opinion letter to the Honorable Kenneth J. Rothman
313-74	Oct 23	COMPENSATION. COUNTY ASSESSORS.	County assessors may receive additional compensation for the duties imposed on them under Sections 53.073 and 53.074 (Senate Bill No. 373, 77th General Assembly, Second Regular Session) for the year 1974 but that such additional compensation is annual compensation payable only on a prorated basis from the effective date of the act, August 13, 1974, to the end of the year.
314-74	Oct 8		Opinion letter to the Honorable Vernon E. Bruckerhoff
315-74	Nov 25	ARRESTS. LICENSES. MOTOR VEHICLES. HIGHWAY PATROL. MOTOR VEHICLE LICENSES. RECIPROCITY COMMISSION.	1. A statement that additional arrests will be made if there is further movement on the highway of an improperly registered commercial motor vehicle, or that further arrests subsequent to the first arrest for movement on the highway of an improperly registered commercial motor vehicle will be made by members of the Missouri State Highway Patrol, as proposed by the Missouri Highway Reciprocity Commission, is not illegal or improper under Missouri law. 2. Such action by an officer of the Missouri State Highway Patrol would not render him liable to civil damages for loss of revenue or damage to the vehicle and cargo during the period of time that the vehicle is parked pending proper registration/and payment of proper fees. 3. Any delay in movement of the goods contained in the improperly registered commercial motor vehicle pending proper registration and payment of the proper fees would not give rise to a successful charge of unduly burdening interstate commerce.
320-74	Oct 31	CONSTITUTIONAL LAW. STATE BUILDINGS.	The Wainwright Building architectural design contest does not violate Section 38(a) of Article III of the Missouri Constitution because the payment of prize money to the architects who submitted the winning designs for renovation and reconstruction of the Wainwright Building constituted a payment for services of the architects and not a gratuitous grant prohibited by the provisions of Section 38(a) of Article III.

323-74	Oct 29		Opinion letter to Dr. Arthur L. Mallory
324-74	Oct 16	STATE AUDITOR. PETITIONS. VOTERS. REGISTRATION.	With respect to petitions for the audits of political subdivisions by the state auditor under subsection 2 of Section 29.230, RSMo, that: (a) "qualified voter" as used in such subsection means registered voter; (b) petitioners must be registered as of the time of signing the petitions although the auditor may use the notarization date as the date to verify whether such signers are registered in the absence of any date on the petitions indicating the precise date of the signatures; (c) insufficient petitions may be supplemented by permission of the state auditor if the auditor believes that there is a reasonable expectation that sufficient signatures may be obtained within a reasonable time.
327-74	Dec 18	COMPENSATION. COUNTY OFFICERS. COUNTY ASSESSORS.	To the extent that the salaries of assessors of second, third, or fourth class counties would be increased by the provisions of Section 53.071.3, Senate Bill No. 373, 77th General Assembly, Second Regular Session, because of the use of the present tax year's assessed valuation instead of the preceding year's assessed valuation, such section does not apply to such assessors during their present terms of office.
328-74	Oct 29	REGIONAL PLANNING COMMISSION. PLANNING AND ZONING.	The requirements of notice, publication and public hearing contained in Section 251.430, RSMo, do not apply to the withdrawal at the end of a fiscal year of a regional planning commission by a local unit of such regional planning commission when the commission has been in existence more than ninety days.
329-74			Withdrawn
330-74	Oct 8		Opinion letter to the Honorable Zane White
331-74	Dec 31		Opinion letter to Mr. Robert L. James
334-74	Nov 18	SENATORS. LEGISLATORS. REPRESENTATIVES. GENERAL ASSEMBLY. CONSTITUTIONAL LAW. CONFLICT OF INTEREST.	A member of the General Assembly who is an agent for an insurance company is not prohibited by the Constitution or state law from selling group insurance covering school personnel.
339-74	Oct 28		Opinion letter to Dr. Arthur L. Mallory
340-74	Nov 4	SCHOOLS. OFFICERS.	A member of a school board of an urban district, who is elected secretary or treasurer of the board, is prohibited from receiving

		COMPENSATION. SCHOOL DISTRICTS.	compensation for services as secretary or treasurer.
341-74	Dec 5		Opinion letter to the Honorable Bud Fendler
342-74	Nov 27		Opinion letter to the Honorable Bud Fendler
346-74	Nov 13	MORTGAGES. DEED OF TRUST. RECORDER OF DEEDS.	When a deed of trust or mortgage is filed for record in a second class county to secure the payment of a guaranty in writing as described herein such guaranty shall be presented to the recorder of deeds who shall stamp or write upon such written guaranty an identification thereof as being instruments described in such mortgage or deed of trust, and in certifying the releases, the recorder shall certify that such identified instruments were produced and canceled.
347-74	Oct 31		Opinion letter to Dr. Arthur L. Mallory
348-74	Dec 5		Opinion letter to Mr. James R. Spradling
349-74	Nov 7		Opinion letter to Mr. Robert L. James
350-74	Nov 18	BONDS. SEWERS. COUNTIES. COUNTY COURT. REVENUE BONDS.	A sewer district organized by a county court of a third class county under the provisions of Sections 249.430 to 249.660, RSMo, has authority to issue revenue bonds under the provisions of Chapter 250, RSMo.
351-74	Nov 8	COUNTY TREASURERS. COMPENSATION. COUNTY OFFICERS. OFFICERS.	Section 146.056, RSMo, which requires certain duties of county treasurers with respect to the state intangible tax has been repealed by implication and such treasurers are not entitled to the additional compensation provided by Section 54.275, RSMo for such services no longer rendered by them.
353-74	Dec 17		Opinion letter to the Missouri Commission on Human Rights
355-74	Dec 30		Opinion letter to the Honorable Morris G. Westfall
358-74			Withdrawn
363-74			Withdrawn
364-74			Withdrawn
372-74	Dec 30		Opinion letter to the Honorable Donald L. Manford
373-74	Dec 9		Opinion letter to the Honorable John A. Sharp
376-74	Nov 25		Opinion letter to the Honorable William S. Brandom
377-74			Withdrawn
382-74	Dec 31	SUNSHINE LAW. CITIES, TOWNS &	1. Section 610.100, RSMo Supp. 1973, with respect to arrest records, is applicable to arrests for ordinance violations of the City of

		VILLAGES. CRIMINAL PROCEDURE. POLICE COURT. ARRESTS.	Maplewood, if such arrests were made within the geographical boundaries of such city or within the geographical boundaries of St. Louis County. 2. Section 610.100 is not applicable to situations in which the accused person has been given a summons which notifies him that charges are pending against him, but has not actually been arrested. 3. Section 610.100 does not require expungement of records pertaining to arrests for charges which have been amended to charge lesser offenses than those of which the person was originally accused, if the person was charged with any offense within thirty days of his arrest.
--	--	--	---



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

November 13, 1974

OPINION LETTER NO. 2

Honorable Joe D. Holt
State Representative, District 109
808 Court Street
Fulton, Missouri 65251

Dear Representative Holt:

This is in answer to your request asking whether a sewer district organized under the provisions of Sections 249.430 through 249.660, RSMo, located within a third class county can furnish service to property located outside the county in which the district was organized.

It is our view that a sewer district organized under the provisions of such sections is without authority to furnish service to property located outside the district boundaries either within the county in which it is organized or outside of such county. Section 249.440 provides that in accordance with the provisions of Section 249.450, the county court shall have power to establish sewer districts and provide for the construction of sewers therein. Section 249.540, giving the county court the right to condemn any land within or without the district for right-of-way for sewers or other improvements or structures deemed necessary in connection with the sewer system of the sewer district does not, we believe, give authority to the sewer district to provide sewer service to persons living outside the district, but authorizes the acquisition of property by the county court within or without the district necessary to provide a sewer system to persons within the sewer district.

It is therefore our view that the provisions of Sections 249.430 through 249.660 do not authorize such a sewer district to furnish service to property located outside such sewer district.

Honorable Joe D. Holt

Section 250.010, RSMo, provides, in part, as follows:

"1. In addition to all powers granted by law and now possessed by cities, towns and villages in this state for the protection of the public health, any city, town or village, whether organized under the general law or by special charter or constitutional charter, and any sewer district organized under chapter 249, RSMo, as that chapter now exists, or as it may be amended, is hereby authorized to acquire, construct, improve or extend and to maintain and operate a sewerage system and to provide funds for the payment of the cost of such acquisition, construction, improvement or extension and operation as hereinafter provided. Such sewerage system may be constructed and operated either within or without the corporate boundaries of any such city, town or village or sewer district." (Emphasis Added)

Section 250.190, RSMo, provides as follows:

"Any such city, town or village or sewer district operating a sewerage system or a combined waterworks and sewerage system under this chapter shall have power to supply water services or sewerage services or both such services to premises situated outside its corporate boundaries and for that purpose to extend and improve its sewerage system or its combined waterworks and sewerage system. Rates charged for sewerage services or water services to premises outside the corporate boundaries may exceed those charged for such services to premises within the corporate limits." (Emphasis Added)

Under the provisions of Sections 250.010 and 250.190, sewer districts organized under Chapter 249 are authorized to construct and operate the sewerage system and furnish sewerage services to persons outside the corporate boundary of the sewer district as well as those persons within the corporate boundaries of such district.

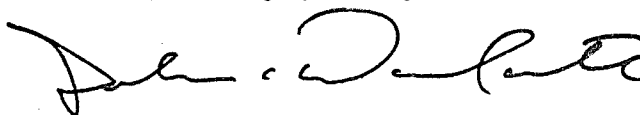
It is our view that the provisions of Sections 250.010 and 250.190 do not grant authority to sewer districts organized under the provisions of Sections 249.430 through 249.660 to provide sewer services to persons living outside the sewer district. It is our view that sewer districts organized under Sections 249.430

Honorable Joe D. Holt

through 249.660 do not have "corporate" boundaries but are simply geographical areas, the boundaries of which are set by order of the county court and such sewer districts are not political subdivisions or public corporations and therefore have no "corporate" boundaries. It is our view that the reference to "corporate boundaries" in Sections 250.010 and 250.190 limits the application of such sections to the sewer districts organized under Chapter 249, which are incorporated districts, including districts organized under provisions of Sections 249.010 through 249.420 and districts organized under Sections 249.760 through 249.810. Section 249.060 provides that a sewer district organized under its provisions is "incorporated" by the court and that the district shall then be a "body corporate" and shall possess the powers like or similar to public corporations. Section 249.767 provides for the incorporation of a sewer district and that such district is a "public corporation". Section 249.777 provides that the sewer district therein provided for is a political subdivision of the state. It is our view that only sewer districts which are actually "incorporated" have "corporate boundaries" and that only such sewer districts as have been "incorporated" are included within the provisions of Sections 250.010 and 250.190.

Therefore, it is our view that a sewer district established by the county court under the provisions of Sections 249.430 through 249.660, RSMo, located within a third class county cannot furnish service to property located outside the boundaries of such district.

Very truly yours,

A handwritten signature in dark ink, appearing to read 'John C. Danforth', written in a cursive style.

JOHN C. DANFORTH
Attorney General

February 22, 1974

OPINION LETTER NO. 3
Answer by letter-Jones

Honorable James C. Kirkpatrick
Secretary of State
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

This letter is to acknowledge receipt of your request for an opinion which reads as follows:

"Is a foreign corporation which is seeking to qualify in Missouri or already qualified in Missouri liable for the payment of an initial qualification tax or an increased qualification tax pursuant to Chapters 351.585 (5) or 351.600(3) RSMo based upon its proportion of stated capital and surplus represented by its property located and business transacted in Missouri (but in no event less than value of its property located in Missouri) when the said foreign corporation has absorbed by merger an existing domestic corporation or foreign corporation which has theretofore paid to the State of Missouri its incorporation or domestication tax; if so, is a tax credit due the surviving corporation for those taxes previously paid by the merging domestic or foreign-qualified corporation?"

First of all, it is our view that a foreign corporation which is seeking to do business in Missouri for the first time is required to pay a qualification fee to the state of Missouri in accordance with Section 351.585(5), RSMo 1969, and that there is no constitutional difficulty. Opinion of the Attorney General No. 202, Valier, 1970 (copy enclosed). However, in regard to a foreign corporation

Honorable James C. Kirkpatrick

which has previously qualified to do business in Missouri and is subsequently absorbed by merger with a foreign or domestic corporation so that the surviving corporation is a continuation of the foreign corporation which had previously qualified to do business in Missouri, we recognize that a constitutional question may be raised in regard to the provisions of Section 351.600(3), RSMo 1969. Nevertheless, there is authority for the proposition that statutes are presumed to be constitutional, and a court will not declare an act unconstitutional unless it plainly contravenes the Constitution. Borden Company v. Thomason, 353 S.W.2d 735, 743 (Mo. Banc 1962). In addition, it has been pointed out that when a corporation claims under its charter an exclusive right or privilege, or any right or privilege as against the state, or otherwise as against the general public, the charter is to be construed strictly against the corporation, and in favor of the public, and such a right or privilege will not be held to exist unless it has been granted by the legislature in clear and unmistakable terms. 15 W. Fletcher, Private Corporations, Section 7041, page 6. Lastly, Attorney General Opinion No. 89, Toberman, 1-23-50 was never formally withdrawn and is being reaffirmed in support of our views.

It is, therefore, our opinion that credit is not due the surviving corporation for those taxes or fees previously paid by the merging domestic or foreign qualified corporation.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 202
4-15-70, Valier

PUBLIC RECORDS:
CITIES, TOWNS & VILLAGES:
CONSTITUTIONAL CHARTER CITIES:

Constitutional charter cities
come within the provisions of
the State and Local Records
Law, Sections 109.200 et seq.,
V.A.M.S.

OPINION NO. 4

April 11, 1974

Honorable James C. Kirkpatrick
Secretary of State
State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Kirkpatrick:

This is in response to your request for an opinion on the question of whether or not constitutional charter cities are subject to the State and Local Records Law, Sections 109.200 et seq., V.A.M.S.

You also inquire whether there are state and local agencies which are not included within the provisions of that law. Your second question is too general to answer. Should a dispute arise in the future concerning a specific agency, this office will give a ruling at that time concerning the applicability of law to that agency.

However, your attention is directed to Opinion No. 285 dated September 14, 1965, to Kirkpatrick, which held that a predecessor act concerning public records did not apply to the University of Missouri. The reasoning of that opinion applies equally to the present law. Therefore, the University of Missouri is not covered by the State and Local Records Law.

Your first question depends on whether or not the definition of the word "agency" in Section 109.210(1) includes a constitutional charter city. Agency is defined as:

"'Agency', any department, office, commission, board or other unit of state government or any political or administrative subdivisions created for any purpose under the authorities of or by the state of Missouri;"

Honorable James C. Kirkpatrick

We note that subsection 1 of Section 109.255, V.A.M.S., authorizes the Secretary of State to appoint local board members as follows:

"The secretary of state is hereby authorized to appoint and serve as chairman of a local records board to advise, counsel, and judge what local records shall be retained, copied, preserved, or disposed of and in what manner these functions shall be carried out by the director. This board shall represent a wide area of public interest in local records and shall consist of at least twelve members one of whom shall represent school boards, one constitutional charter city, one third class city, one fourth class city, one village, one township, one for each class of county, one higher education, one historical society and such other members as the secretary of state shall direct." (Emphasis added)

This provision indicates a clear legislative intent that constitutional charter cities are included within the purview of these statutes.

In our view a constitutional charter city is an "agency" within the provisions of the State and Local Records Law. It is also our view that such state law controls notwithstanding any contrary city charter provisions.

CONCLUSION

It is the opinion of this office that constitutional charter cities come within the provisions of the State and Local Records Law, Sections 109.200 et seq., V.A.M.S.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Yours very truly,



JOHN C. DANFORTH
Attorney General



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

May 30, 1974

JOHN C. DANFORTH
ATTORNEY GENERAL

OPINION LETTER NO. 5

Honorable Joseph S. Kenton
State Representative, 32nd District
8553 Holmes
Kansas City, Missouri 64131

Dear Representative Kenton:

This is in response to your request for an opinion on the following question:

"Does a free public library have the right to charge a free public school a fee for audio-visual equipment and materials if the school district is entirely within the library district and the citizens of the school district pay taxes to support the library?"

From the facts stated in your opinion request, we are able to ascertain that the library district in question is actually a multi-county public library service organization formed pursuant to a cooperative agreement under Chapter 70, RSMo, made up of several county library districts. However, with respect to this opinion request this fact is not material and for the purposes of our answer we will assume that the district in question is a county library district.

Article IX, Section 10 of the Constitution provides as follows:

"It is hereby declared to be the policy of the state to promote the establishment and development of free public libraries and to accept the obligation of their support by

Honorable Joseph S. Kenton

the state and its subdivisions and municipalities in such manner as may be provided by law. When any such subdivision or municipality supports a free library, the general assembly shall grant aid to such public library in such manner and in such amounts as may be provided by law."

Chapter 182 provides that county library districts are under control of a board of trustees. The board of trustees of such districts are authorized to establish a "free county library", Section 182.060, RSMo 1969.

Your opinion request presents the issue of whether the charging of school districts for the use of films is inconsistent with the provisions in the statutes and the State Constitution for free public libraries. In our opinion, such charges are consistent.

We understand that the library district contains two 16mm film collections. One is available to the public, the other to schools. With respect to the school collection, which is particularly suited for school instructional purposes, the library makes collections available to school districts at a specified charge per booking. By this method numerous school districts in the area have access to a larger film collection than would be available if each district were to depend upon its resources.

No state law requires that the libraries contain film collections for the use of school districts. Therefore, the maintenance of such a collection is not among the primary or essential purposes for which the library exists. Rather, the maintenance of such a collection is incidental to the library's primary functions. In Opinion No. 66, May 7, 1973, this office considered various questions posed by local schools in view of the provision of Article IX, section 1(a) of the Constitution providing for the maintenance of "free public schools". We held that a school district may charge for extracurricular activities such as yearbooks and athletic events since such activities were not a necessary element of attending school. Likewise, we find that the providing of 16mm films to school districts by a library is not a necessary element of providing a free public library, but of an "extracurricular" nature.

Such a position is consistent with the views expressed by the Rhode Island Supreme Court in Gregory's Book Store v. Providence Public Library, 46 R.I. 283, 127 A. 150 (1924). There the Rhode Island Court held that a library could impose a charge for the use of a duplicate collection of recent fiction volumes, even

Honorable Joseph S. Kenton

though the library was classified as a "free public library". The court determined that the phrase "free public library" should be used in the popular sense of "a library the use of the books of which are free to the public", and that the service at issue was an additional, supplemental service provided by the library for a small fee beyond the basic service of providing free books. In a similar vein the maintenance of a special film collection for schools is an additional, supplemental activity of a Missouri "free public library" and charging school districts for use of such film is not inconsistent with the statutes of a library as a "free public library."

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 66
3-7-73, Mallory

February 14, 1974

OPINION LETTER NO. 8
Answer by letter-Jones

Honorable William J. Cason
State Senator, District 31
Room 422, Capitol Building
Jefferson City, Missouri 65101



Dear Senator Cason:

This letter is to acknowledge receipt of your request for an opinion from this office which reads as follows:

"Can a cost of living increment constitutionally be added to the pension benefits of persons retired under the public school retirement system?"

In State ex rel. Breshears v. Missouri State Employees' Retirement System, 362 S.W.2d 571 (Mo. Banc 1962), it was held that a 1961 amendment to a 1957 statute permitting payment of increased benefits to retired members of the Missouri State Employees' Retirement System would take a portion of the fund existing when the amendment was passed to pay the increase and would impair a contract with active members in violation of Section 13, Article I of the Missouri Constitution.

It is our view that the holding in the Breshears case is applicable to your question. Therefore, any increase which is based on cost of living would be invalid if granted by the legislature.

Yours very truly,

JOHN C. DANFORTH
Attorney General

ELECTIONS: Election challengers or watchers may not be appointed for an election conducted by a six-director school district except in St. Louis County. Where a school election is held jointly with an election for which challengers or watchers may properly be appointed, however, those challengers or watchers may challenge voters in the school election as well as the other election.

OPINION NO. 9

April 8, 1974

Honorable James C. Kirkpatrick
Secretary of State
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

This official opinion is in response to your request for a ruling on the following questions:

"May challengers or watchers be appointed by political parties, candidates, or others for an election conducted by a six-director school district?

"If so, who is authorized to sign the certificate of appointment for the challengers and watchers, and what rights and responsibilities do the challengers and watchers operate under?

"If the answer is no, may challengers and watchers appointed under other authority for other elections play an official role in the six-director school election when those elections are held in conjunction with other municipal elections held on the same day under the authority of Chapter 111.111?"

Generally speaking, the only people who are authorized to be in a polling place during the hours of an election are election clerks, election judges, and voters casting ballots. However, in addition to these people with their official functions, the legislature may also permit election challengers or watchers to sit in at an election under regulations prescribed by the legislature. 29 C.J.S. Elections § 200. The role and status of challengers and

Honorable James C. Kirkpatrick

watchers was described by the Missouri Supreme Court in the case of Preisler v. Calcaterra, 243 S.W.2d 62 (Mo. Banc 1951) at pages 65 and 66:

"[6] Challengers and watchers are in no sense public officials charged by law with the responsibilities of conducting fair and impartial elections, 'free and open.' They are not even under oath. And they are not subject to the penalties provided by Chapter 118, supra, as are the appointive officials of elections. They may or may not be in attendance at the polls. Their function is partisan, not nonpartisan in character. The Supreme Court of Pennsylvania pointed out these distinctions in stating the difference between 'overseers' and 'watchers' of elections in Pennsylvania, in Re Parrish's Petition, 214 Pa. 63, 63 A. 460, 461. The overseers were, by constitutional authority, appointed by the Court of Common Pleas. The watchers were appointed by each political party under authority of statute. The overseers had the duty and authority to supervise the proceedings of election officers and to make report to the Court as required, in order 'to secure the purity and fairness of elections.' The Court said watchers, unlike overseers, 'are not appointed by the court, they are not amenable to it, and they are not required to report to it. They hold their position solely by virtue of an appointment by a political party, to which good faith and political honesty require them to be true, but to which they are not legally responsible. They are not even officers, such as are known to the law, but simply the agents of the party which appoints them to protect its political interests at the polls, and who the law permits to be present in the voting room for that purpose, without compensation and without any authority or control over the proceedings of the election officers.' (Our italics.)"

The presence of challengers and watchers is subject to statutory regulation and the right to be represented at a polling place by a challenger usually extends only to political parties, not to individual candidates. Preisler v. Calcaterra, supra. Thus, the

Honorable James C. Kirkpatrick

legislature has provided for the presence of election watchers or challengers at elections held in the city of St. Louis (Section 118.510, RSMo), in St. Louis County (Sections 113.200-113.205, RSMo), in Kansas City (Section 117.590, RSMo), in Clay County (Section 119.480, RSMo), in certain municipal elections (Sections 76.040, 78.530, 122.440, and 122.780, RSMo), in Jackson County outside of Kansas City (Section 113.870, RSMo), at certain primary elections (Section 120.480, RSMo), and for certain other elections.

Notably absent from this list, however, is any statutory authorization for challengers at school elections (except in St. Louis County where all school elections are governed by Chapter 113, RSMo). This evident legislative scheme for providing challengers and watchers only at specifically enumerated elections leads us to the inescapable conclusion that challengers and watchers are not authorized at school elections.

In view of this conclusion, it is unnecessary to answer your second question.

Your third question involves elections held jointly by school districts and other election authorities where challengers or watchers are present pursuant to separate provisions of the law. Although you refer to Section 111.111, RSMo, joint elections are also authorized by Section 162.371, RSMo, and our opinion deals with elections held pursuant to either of these sections.

The only power an election challenger has is the power to watch for possible violations of the election laws and bring them to the attention of the polling judges. There is nothing in the statutes which suggests that this power is limited to any particular candidate or issue. On the contrary, if a challenger succeeds in disqualifying a voter from casting a ballot in a city or county or state election, we can conceive of no reason why that challenge should not also extend to the potential voter's right to cast a school ballot.

CONCLUSION

It is, therefore, the opinion of this office that election challengers or watchers may not be appointed for an election conducted by a six-director school district except in St. Louis County. Where a school election is held jointly with an election for which challengers or watchers may properly be appointed, however, those challengers or watchers may challenge voters in the school election as well as the other election.

Honorable James C. Kirkpatrick

The foregoing opinion, which I hereby approve, was prepared by my assistant, Richard E. Vodra.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent.

JOHN C. DANFORTH
Attorney General

LIBRARIES:
CITY LIBRARIES:
COUNTY LIBRARIES:

Once a county library district is created by the county court, such district exists whether or not the voters adopt a tax levy for the district; and after such a district is created, a city library district may not be created within the county library district.

OPINION NO. 10

May 16, 1974



Mr. Charles O'Halloran
State Librarian
Missouri State Library
308 East High Street
Jefferson City, Missouri 65101

Dear Mr. O'Halloran:

This is in response to your request for an opinion on the following question:

"The General Assembly passed S.B. 583 during the 76th General Assembly. This measure was approved by the Governor and took effect on August 15, 1972. Included in S.B. 583 was Section 182.015 which empowered a County Court to establish a county library district and provided further that should the Court establish the district the Court must submit to the voters of the district a proposition providing for a tax to support the district.

"Should a County Court create a county library district under this provision and should the voters fail to approve a tax to support it, does the district continue to exist? Section 182.140, RSMO, permits the citizens of any city in the State having a population of 5,000 or more to create a city library district. Should such a city exist in a county in which the County Court has created a district under Section 182.015, and in which district the voters have failed to approve a tax for the county library, may the citizens of that city exercise their rights under Section 182.140 and create a city library district?"

Mr. Charles O'Halloran

Section 182.015, RSMo Supp. 1973, provides a method for the creation of county library districts by action of the county court without petition or submission to the voters, as would be the case if a district was created pursuant to Section 182.010, RSMo 1969. If the county court has created a library district in accordance with the procedures set forth in Section 182.015, it shall submit a rate of taxation for the library district to the voters in the same manner as the tax rate would be submitted to the voters if the district had been formed under the provisions of Section 182.010. If the voters fail to adopt the tax rate, there is no provision which provides for the disincorporation of the district. The district continues to exist and has to depend upon appropriations from the state pursuant to the authority conferred upon the General Assembly under Article IV, Section 10 of the State Constitution to grant aid to such public library and upon gifts of real and personal property for the use and benefit of the county library, Section 182.070, RSMo 1969, until such time as the voters of the district adopt a tax levy.

Section 182.140, RSMo 1969, providing for the creation of city library districts does not expressly prohibit a city that is within a county library district from establishing a separate city library district. However, to do so would be to establish a library district within a library district. Section 182.010 providing for the creation of county library districts is very explicit in providing that a newly created county district is not to include territory of cities and towns within the county which maintain and control free public libraries. Section 182.480, RSMo 1969, provides that when a city maintaining a library district annexes territory that is part of a county library district the territory so annexed remains as part of the county library district and such property is subject to taxation only by the county library district. Section 182.291, RSMo Supp. 1973, provides a method by which a county library board can request the county court to permit the organization of a city-county library which shall provide library services to residents of the county by appropriate means from the city library. Section 182.610, RSMo Supp. 1973, provides that two or more county libraries may join together and create a consolidated public library district. While the legislature has not abolished city library districts, or prevented their formation in cities located in counties which do not contain a county library district, the legislature has restricted encroachment by city districts into territory containing the county library district and has also provided that a city library district may be abolished by the formation of a city-county library district by the county court. Based on the foregoing, we do not believe that a city may organize a library district within a county library district.

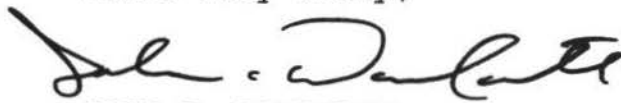
Mr. Charles O'Halloran

CONCLUSION

It is the opinion of this office that once a county library district is created by the county court, such district exists whether or not the voters adopt a tax levy for the district and that after such a district is created, a city library district may not be created within the county library district.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Charles A. Blackmar.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

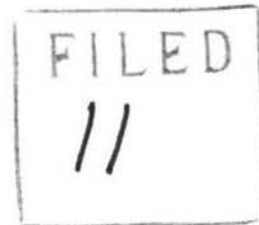
JOHN C. DANFORTH
Attorney General

SCHOOLS: Any balance remaining in a school district's
TEXTBOOK FUND: free textbook fund after textbooks are fur-
TEACHERS' FUND: nished to all eligible pupils as required
in Section 170.051, RSMo 1969, as amended,
may be transferred to the teachers' fund as required by Section
165.011, subsection 2, RSMo 1969, without conflicting with the
restriction on commingling free textbook funds with the public
school fund as set forth in subsection 7 of Section 170.051,
Seventy-Sixth General Assembly, Second Regular Session.

OPINION NO. 11

March 6, 1974

Dr. Arthur L. Mallory
Commissioner of Education
State Department of Education
Jefferson State Office Building
Jefferson City, Missouri 65101



Dear Commissioner Mallory:

This official opinion is issued in response to your
request for a ruling on the following question:

"Was that portion of Section 165.011(2),
RSMo, repealed by implication that
requires school districts to transfer
any balance remaining in the free text-
book fund to the teachers' fund by
enactment by the Seventy-sixth General
Assembly of SCSSB 638, Section 170.051(7)
that forbids the commingling of textbook
fund moneys with the public school fund
referred to in Section 5, Article IX of
the Missouri Constitution?"

You indicate in your request that several school admin-
istrators in school districts in the state are concerned about
the proper procedure to follow in making their annual report
as required by Sections 165.111 and 162.821, RSMo 1969.

Section 165.011, pertaining to the funds each school dis-
trict must maintain to account for its school moneys, provides
as follows in subsection 2 thereof:

Dr. Arthur L. Mallory

" . . . If a balance remains in the free textbook fund after books are furnished to pupils as provided in section 170.051, RSMo, it shall be transferred to the teachers' fund. . . ."

Your inquiry is whether this provision of Section 165.011 was repealed when the legislature enacted in 1972 the free textbook law--Sections 170.051 and 170.055. Specifically, you suggest a possible conflict between the above-quoted provision of Section 165.011 and subsection 7 of Section 170.051, which prohibits the commingling of textbook fund moneys with the public school fund:

" . . . No portion of the public school fund referred to in section 5, article IX, constitution of this state, shall be used to pay the cost of textbooks under this section nor shall funds under this section be in any way commingled with the public school fund."

The public school fund is created by Section 5 of Article IX, which section provides as follows:

"The proceeds of all certificates of indebtedness due the state school fund, and all moneys, bonds, lands, and other property belonging to or donated to any state fund for public school purposes, and the net proceeds of all sales of lands and other property and effects that may accrue to the state by escheat, shall be paid into the state treasury, and securely invested under the supervision of the state board of education, and sacredly preserved as a public school fund the annual income of which shall be faithfully appropriated for establishing and maintaining free public schools, and for no other uses or purposes whatsoever."

Dr. Arthur L. Mallory

In McVey v. Hawkins, 258 S.W.2d 927 (Mo. Banc 1953), the Supreme Court of Missouri held unlawful a school district's transportation of children to and from their non-public schools because the income from the public school fund had been commingled with moneys from other sources and, therefore, it was impossible to determine that the transportation was being provided from funds other than income from the public school fund. We believe that subsection 7 of Section 170.051 was intended by the legislature to assure compliance with the McVey decision by prohibiting the commingling of foreign insurance tax receipts with income from the public school fund.

However, once the school district has furnished textbooks to all children entitled to them under Section 170.051, any excess funds could be transferred to the teachers' fund as required in Section 165.011. Arguably, there is no conflict between Section 165.011 and subsection 7 of Section 170.051 because the former applies only ". . . after books are furnished to pupils as provided in section 170.051, . . ." Section 165.011 only provides a method for utilizing unused textbook funds and does not purport to affect funds needed to carry out the purposes of Section 170.051.

Even if a conflict does exist between these two sections, Missouri law does not favor repeals by implication.

"It is the established rule of construction that the law does not favor repeal by implication and where there are two or more provisions relating to the same subject matter they must, if reasonably possible, be construed so as to maintain the integrity of both. . . ." Gross v. Merchants-Produce Bank, 390 S.W.2d 591, 598 (K.C.Mo.App. 1965).

Where two statutes relating to the same subject conflict, regardless of whether they are enacted during the same session of the General Assembly or different sessions, a court should construe them so that both can be ". . . upheld and given force and effect if reasonably possible to do so. . . ." State v. Chadeayne, 313 S.W.2d 757, 759 (St.L.Mo.App. 1958).

Dr. Arthur L. Mallory

As previously indicated, we believe it is reasonably possible to harmonize the second sentence of subsection 2 of Section 165.011 with the second sentence of subsection 7 of Section 170.051 and thereby give force and effect to both. The prohibition of subsection 7 of Section 170.051 can be followed without infringing upon the subject covered by subsection 2 of Section 165.011. Only after a school district has fully complied with its responsibilities under Section 170.051 is a transfer of free textbook funds authorized. If a district has furnished textbooks to all eligible children, the purpose for the prohibition in subsection 7 of Section 170.051 has been satisfied and the excess funds may be utilized for other authorized purposes.

CONCLUSION

Therefore, it is the conclusion of this office that any balance remaining in a school district's free textbook fund after textbooks are furnished to all eligible pupils as required in Section 170.051, RSMo 1969, as amended, may be transferred to the teachers' fund as required by Section 165.011, subsection 2, RSMo 1969, without conflicting with the restriction on commingling free textbook funds with the public school fund as set forth in subsection 7 of Section 170.051, Seventy-Sixth General Assembly, Second Regular Session.

The foregoing opinion, which I hereby approve, was prepared by my assistant, D. Brook Bartlett.

Very truly yours,



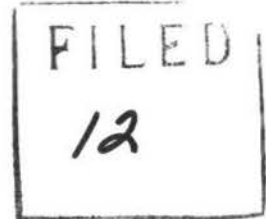
JOHN C. DANFORTH
Attorney General

SCHOOLS:
ELECTIONS:

Residents on land which is part of a federal flood control project are entitled to vote in local school district elections.

OPINION NO. 12

April 8, 1974



Honorable Al Nilges
Representative, District 126
Room 413, Capitol Building
Jefferson City, Missouri 65101

Dear Representative Nilges:

This official opinion is in response to your request for a ruling on whether persons are eligible to vote in school elections if they live on land acquired by the federal government as part of a flood control project. As we understand it, your concern is directed toward lands currently being acquired by the federal government as part of the Meramec Dam project.

Although the rule was once otherwise, the law is now clear that a person does not lose his right to vote merely because he lives on federal property. Evans v. Cornman, 398 U.S. 419, 90 S.Ct. 1752, 26 L.Ed.2d 370 (1970); Carrington v. Rash, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965); Opinion No. 185, Price, November 27, 1963. Thus, if these people reside in a school district, they are entitled to vote in that school district's elections.

It is our view that the residents of flood control land do live in school districts. This conclusion follows from Sections 12.080 through 12.100, RSMo 1969, allocating to school districts certain moneys paid by the federal government. Section 12.100 reads as follows:

"The county court of each county receiving any such moneys shall use the funds to aid in maintaining the schools and roads and for defraying any of the expenses of the county in accordance with the provisions set forth in sections 12.070 and 12.080. The county court shall allow to the school districts and for roads an amount based upon their respective levies equal to that which would ordinarily be allowed to them out of taxes from property owned by the United States if

Honorable Al Nilges

the property were privately owned before using any of the moneys for defraying other expenses of the county."

This allocation formula clearly contemplates that the federal property is located within a school district. Further, we find nothing in the statutes which indicate that this land ceased being part of a school district simply because it was transferred to federal ownership.

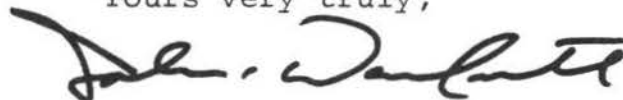
Since the residents of federally-owned flood control land live in a school district, they are entitled to vote in school district elections on the same basis as all other voters in the district.

CONCLUSION

It is, therefore, the opinion of this office that residents on land which is part of a federal flood control project are entitled to vote in local school district elections.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Richard E. Vodra.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 185
11-27-63, Price

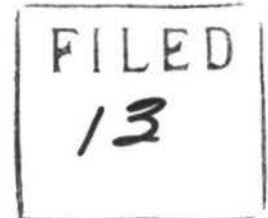
RECORDER OF DEEDS:

County recorders of deeds are not authorized to make reports on real estate lien searches for the Farmers Home Administration (Form FHA-Mo 427-4, 4-2-71).

OPINION NO. 13

April 26, 1974

Honorable James S. Millett
Prosecuting Attorney
Caldwell County
Post Office Box 8
Kingston, Missouri 64650



Dear Mr. Millett:

This opinion is in response to your questions asking:

"A. Is the Recorder of Deeds required to make a record search of the records in his office and give findings?

"B. Can the Recorder's statement of the search of his records concerning Deeds or Deeds of Trust of record be considered a legal opinion and practicing law?

"C. Assuming that it is legal and proper for the Recorder to render opinions on his search of his records concerning Deeds and Deeds of Trust; does that in any way jeopardize his bond; or place an additional risk on the bonding company?"

You further state that:

"The Recorder of Deeds has been advised that the Farmers Home Administration will begin or has begun a policy of requesting opinions from the Recorder of Deeds concerning the records in his custody on forms provided by the FHA to make preliminary title search; and title search regarding real estate transactions involving the FHA. The FHA presumably to pay a fee therefor."

A copy of the document to which you refer, identified as FHA-Mo 427-4 (4-2-71), is attached to this opinion.

Honorable James S. Millett

We find no statutory provisions requiring the recorder to make such searches and give such findings. Our Opinion No. 48 dated September 22, 1966, to McCaffree, copy enclosed, noted that Section 400.9-407, RSMo, did not apply to security interests in real property, except as to fixtures attached thereto.

Further, as you have noted, Section 59.200, RSMo, provides:

"Every recorder of deeds or the deputy of any such officer, who shall engage in the business of making abstracts of instruments of record in his office affecting the title to lands, for profit or hire, or who shall furnish to any person or persons any written extract, excerpt, memoranda or copy of any such instrument of record, for profit or hire, otherwise than under and in pursuance of the statutes defining his duties as such officer and in his official capacity, duly authenticating each extract, excerpt, memoranda or copy of every such instrument so furnished under the seal of his office, shall be deemed guilty of a misdemeanor and shall, upon conviction, be punished by a fine of not less than twenty nor more than fifty dollars."

We find no statute authorizing the recorder to make the real estate lien search report, Form FHA-Mo 427-4 (4-2-71).

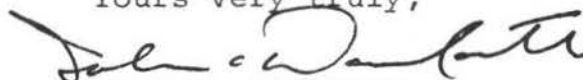
We conclude, in view of the answer to your first question, that it is not necessary to answer the other questions you pose.

CONCLUSION

It is the opinion of this office that county recorders of deeds are not authorized to make reports on real estate lien searches for the Farmers Home Administration (Form FHA-Mo 427-4, 4-2-71).

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosures: Form FHA-Mo 427-4
(4-2-71)

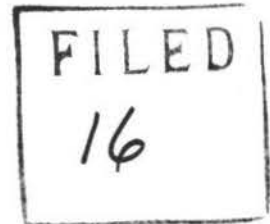
Op. No. 48
9-22-66, McCaffree

SCHOOLS: The positions of director of a special
SCHOOL DISTRICTS: school district and director of a six-
CONFLICT OF INTEREST: director district which is a component
part of that special school district are
incompatible and one person may not hold both positions at the
same time.

OPINION NO. 16

March 20, 1974

Dr. Arthur L. Mallory
Commissioner of Education
Department of Education
Sixth Floor, Jefferson Building
Jefferson City, Missouri 65101



Dear Dr. Mallory:

This official opinion is in response to your request for a ruling on the following questions:

"Would it be legally permissible for a member of a component six-director school district board to also serve as a member of the board of the Special School District of St. Louis County? In other words, are these offices incompatible?"

You advise in your opinion request that an individual in St. Louis County, currently serving as a director of a St. Louis County school district, is a candidate for membership on the board of education of the Special School District of St. Louis County. Should he be elected to the board of the Special School District, he would like to continue serving on both school boards at the same time.

It is a settled principle of law that unless the Constitution, a statute or the common law prohibits the holding of two public offices by one individual, an individual may hold two offices simultaneously. United States v. Saunders, 120 U.S. 126 (1887); State ex rel. Zevely v. Hackmann, 300 Mo. 59, 254 S.W. 53 (Banc 1923); State ex rel. Koehler v. Bulger, 289 Mo. 441, 233 S.W. 486 (Banc 1921); State ex rel. Walker v. Bus, 135 Mo. 325, 36 S.W. 636 (Banc 1896); and Bruce v. City of St. Louis, 217 S.W.2d 744 (St.L.Ct.App. 1949). Since there are no constitutional or statutory prohibitions in Missouri against the same person serving on the board of a six-director school district within the boundaries of a special school

Dr. Arthur L. Mallory

district and, at the same time, serving on the board of the special school district, the principal issue posed by your request is whether the two board positions are incompatible under the common law.

The common law rule was stated in the case of State ex rel. Walker v. Bus, supra, as follows:

" . . . At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two,--some conflict in the duties required of the officers, as where one has some supervision of the others, is required to deal with, control, or assist him. It was said by Judge Folger (People v. Green, 58 N. Y. 295): 'Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that "incompatibility" from which the law declares that the acceptance of the one is the vacation of the other. The force of the word in its application to this matter is that, from the nature and relations to each other of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one towards the incumbent of the other. Thus, a man may not be landlord and tenant of the same premises. He may be landlord of one farm, and tenant of another, though he may not at the same hour be able to do the duty of each relation. The offices must subordinate, one the other, and they must per se have the right to interfere, one with the other, before they are incompatible at common law.' . . ." Id. at 639-640.

Two offices are intrinsically incompatible at common law when:

- (a) One is subordinate to the other;

Dr. Arthur L. Mallory

- (b) One has supervisory powers over the other;
- (c) One audits the other's accounts; or
- (d) One has power to appointment, or power of removal over the other.

See State ex rel. Klick v. Wittmer, 144 P. 648 (Mont. 1914) and Attorney General's Opinion No. 167, O'Brien, April 19, 1963, copy enclosed.

A special school district is a district composed of one or more six-director school districts ("component districts") with the limited purposes of educating and training handicapped and severely handicapped children and of providing vocational education. Sections 178.640, et seq., V.A.M.S. (effective until July 1, 1974); Sections 162.815, et seq., V.A.M.S. (effective after July 1, 1974). There is nothing specifically provided in the statutes which states that a person may not be a director of both a special school district and a six-director school district which is a component part of a special school district. However, in examining the duties and powers of a special school district, we conclude that there may be occasions in which conflicts between the two boards would arise.

In Section 162.880, V.A.M.S. (effective after July 1, 1974), a special school district is given the power to:

" . . . established programs for any such [handicapped or severely handicapped] children within any school district included in the special district in classrooms furnished by the school district, . . . "

Section 178.710, V.A.M.S. (effective until July 1, 1974), contains a similar provision. If a special district decided to offer courses in a component district's classroom, the local district must cooperate, but certain practical details would have to be worked out between the two districts. For example, the special district might believe that the classroom offered was not satisfactory, or that it was not being adequately heated or maintained. Disputes could arise when one district or the other decided that continued use of the classroom was undesirable, either because the component district wanted the classroom back or because the special district wanted to move the class elsewhere. In any of these cases, a person who was on both school boards would have divided loyalties and could not properly represent the interests of either. A conflict would exist.

Dr. Arthur L. Mallory

Further, Section 162.905, V.A.M.S., provides as follows:

"Any special school district may, at the discretion of its board of education and upon the request of component local districts, serve as a coordinating agency for cooperative activities including but not limited to group purchasing, centralized computer services, audio-visual services and library services for the school districts served by the special district."

The decision of the members of the board of education of the special district concerning whether or not to authorize the special district to serve as a coordinating agency for cooperative activities may be colored if any of the directors is also a director of the component district which has made the request. It would be difficult for any such decision to be made at arm's length if the same person sat on both boards.

Thus, a special district and a component district have overlapping jurisdictions, and the law requires the two districts to work together. We believe that the potential practical problems outlined above and others which may also arise between the two districts could cause considerable tensions and disagreement, and one person could not properly represent both sides. Thus, the offices are incompatible.

CONCLUSION

It is, therefore, the opinion of this office that the positions of director of a special school district and director of a six-director district which is a component part of that special school district are incompatible and one person may not hold both positions at the same time.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Richard E. Vodra.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 167
4-19-63, O'Brien



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

June 26, 1974

OPINION LETTER NO. 18

Honorable C. E. Hamilton, Jr.
Prosecuting Attorney
Callaway County, Courthouse
Fulton, Missouri 65251

Dear Mr. Hamilton:

This opinion letter is written in response to your request posed to the Office of the Attorney General in which the following question is asked:

"Is a County Recorder in a third class county required to accept for recording one Deed of Release which releases three separate Deeds of Trust?"

Section 59.330, RSMo 1969, provides it is the duty of county recorders to record:

"All deeds, mortgages, conveyances, deeds of trust, bonds, covenants, defeasances, or other instruments of writing, of or concerning any lands and tenements, or goods and chattels, which shall be proved or acknowledged according to law, and authorized to be recorded in their offices;
. . . ."

Section 443.060, RSMo 1969, relating to mortgages and deeds of trust, provides in part that:

"If any mortgagee, cestui que trust or assignee, or administrator of the mortgagee, cestui

Honorable C. E. Hamilton, Jr.

que trust or assignee, receive full satisfaction of any mortgage or deed of trust, he shall, at the request and cost of the person making the same, acknowledge satisfaction of the mortgage or deed of trust on the margin of the record thereof, or deliver to such person a sufficient deed of release of the mortgage or deed of trust; but it shall not in any case be necessary for the trustee to join in such acknowledgment of satisfaction or in such deed of release; and provided further, that when any mortgage or deed of trust shall be satisfied by a deed of release, the recorder shall note on the margin of the record of such deed of trust the book and page where such deed of release is recorded. In case satisfaction be acknowledged by the payee or assignee, or in case a full deed of release is offered for record, the note or notes secured shall be produced and canceled in the presence of the recorder, who shall enter that fact on the margin of the record and attest the same with his official signature; and no full deed of release shall be admitted to record unless the note or notes are so produced and canceled; and that fact entered on the margin of the record and attested as above provided."
(Emphasis added).

Clearly, from the statutory language in the above sections, it is the duty of the county recorder to record a deed of release releasing a mortgagor or trustor from obligation under a mortgage or deed of trust. Nothing in either Chapter 59 or Chapter 443 of the Revised Statutes of this state countermands that duty of the recorder to the extent that a deed, releasing more than one mortgage or deed of trust, is not required to be recorded. Therefore, we answer your inquiry in the affirmative, i.e., a county recorder in a third class county is required to accept for recording one deed of release which releases three separate deeds of trust.

Very truly yours,



JOHN C. DANFORTH
Attorney General

SCHOOLS: The State Board of Education may
SCHOOL FUNDS: invest money accruing to or cur-
STATE BOARD OF EDUCATION: rently in the public school fund
pursuant to Article IX, Section 5
of the Missouri Constitution without first securing an appropri-
ation from the General Assembly, the State Board of Education
may sell securities held by the public school fund before those
securities mature, and it may sell those securities at less than
their original cost to the fund if a portion of the interest re-
ceived from the securities purchased with the proceeds is devoted
to replenishment of the principal of the fund.

OPINION NO. 19

January 24, 1974

Dr. Arthur L. Mallory
Commissioner of Education
Department of Education
Jefferson State Office Building
Jefferson City, Missouri 65101



Dear Dr. Mallory:

This official opinion is in response to your request for a ruling on the following questions:

"Can the State Board of Education invest money accruing to the Public School Fund and also re-invest maturing bonds belonging to the Public School Fund without an appropriation from the General Assembly?"

"Can the State Board of Education sell and re-invest existing bond holdings that have not matured to improve the financial position of the Public School Fund without an appropriation from the General Assembly?"

We understand that your request is prompted by the fact that recent changes in money market conditions have made it unwise to continue holding securities purchased several years ago for the public school fund. Before changing the portfolio of the fund, however, the State Board of Education desires an opinion on the legality of any such changes and the necessity for legislative approval of them.

Dr. Arthur L. Mallory

The public school fund (hereafter, the fund) is created in Article IX, Section 5 of the Missouri Constitution, which reads as follows:

"The proceeds of all certificates of indebtedness due the state school fund, and all moneys, bonds, lands, and other property belonging to or donated to any state fund for public school purposes, and the net proceeds of all sales of lands and other property and effects that may accrue to the state by escheat, shall be paid into the state treasury, and securely invested under the supervision of the state board of education, and sacredly preserved as a public school fund the annual income of which shall be faithfully appropriated for establishing and maintaining free public schools, and for no other uses or purposes whatsoever."

The rules governing the operation of the fund are set forth in Sections 166.011 through 166.111, RSMo. These sections, in brief, provide that the State Board of Education shall invest the money held in the fund (Section 166.011), that the State Treasurer is the custodian and trustee of the money and securities held by the fund (Sections 166.021 through 166.031), and that the Director of Revenue has the authority to accept gifts to the fund which he shall turn over to the Treasurer (Sections 166.061 through 166.111). Income from the investments owned by the fund is paid into the state treasury, credited to the state school moneys fund, and appropriated for the support of free public schools in this state (Sections 166.011, 166.051).

I

Because both of your questions inquire as to the necessity for legislative appropriations for the public school fund, we shall deal with this problem first. The framers of the Missouri Constitution set down the general rule that no money may be paid out of the state treasury in the absence of a corresponding "appropriation made by law." This conclusion arises from the operation of three constitutional provisions. The first is Article III, Section 36, which provides in part as follows:

"All revenue collected and money received by the state shall go into the treasury and the general assembly shall have no power to divert the same or to permit the withdrawal of money from the treasury, except in pursuance of appropriations made by law. . . ."

Dr. Arthur L. Mallory

The second, Article IV, Section 15, provides:

"The state treasurer shall be custodian of all state funds. All revenue collected and moneys received by this state from any source whatsoever shall go promptly into the state treasury, and all interest, income and returns therefrom shall belong to the state. . . ."

Finally, Article IV, Section 28, states:

"No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law, nor shall any obligation for that payment of money be incurred unless the commissioner of administration certifies it for payment and certifies that the expenditure is within the purpose as directed by the general assembly of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it. . . ."

Since Article IX, Section 1(a), establishes public schools as a state responsibility, and Article IX, Section 5, requires certain types of money received by the state to be paid into the treasury for the fund, it is clear that these quoted provisions requiring appropriations apply to the fund. Compare State ex rel. Thompson v. Board of Regents for Northeast Missouri State Teachers' College, 264 S.W. 698 (Mo. Banc 1924), with Petition of Board of Public Buildings, 363 S.W.2d 598 (Mo. Banc 1962). However, "appropriation made by law" does not necessarily mean "appropriation made by statute," and an appropriation may be made by action of the Constitution itself.

The Missouri Supreme Court has adopted the following test to be used to determine if a constitutional provision is self-executing:

". . . 'One of the recognized rules is that a constitutional provision is not self-executing when it merely lays down general principles, but that it is self-executing if it supplies a sufficient rule by means of which the right which it grants may be enjoyed and protected, or the duty which it imposes may be enforced, without the aid of a legislative

Dr. Arthur L. Mallory

enactment. * * * Another way of stating this general, governing principle is that a constitutional provision is self-executing if there is nothing to be done by the legislature to put it in operation. . . ." State ex rel. City of Fulton v. Smith, 194 S.W.2d 302, 304 (Mo. Banc 1946).

While the court in the above case was concerned with whether the Constitution gave cities the power to issue and sell bonds in the absence of any statutory provisions on the subject, the rule may also be applied to questions dealing with appropriations. The test to be applied is whether the terms of the Constitution determine the distribution of the funds without reference to legislative action.

The Missouri Supreme Court has held on at least two occasions that the provisions of the Constitution designating certain money for the support of education are self-executing. In Gross v. Gentry County, 8 S.W.2d 887 (Mo. Banc 1928), the court said, in reference to the provision now found at Article IX, Section 7:

"Incidentally it may be said that, since the adoption of section 5 of article 9 of the Constitution of 1865, which was continued in force in section 8 of article 11 of the Constitution of 1875, the legal necessity of the enactment of statutes directing the disposition of funds arising from fines, penalties, and forfeitures has not existed, except to give formal legislative recognition to the constitutional provision in regard thereto. This provision is affirmative in its nature and direct in its terms; it consists simply in a mandatory declaration as to the disposition that is to be made of the public funds designated, and is self-executing. . . ." 8 S.W.2d at 889-890.

Similarly, the court in New Franklin School Dist. No. 28 v. Bates, 225 S.W.2d 769 (Mo. 1950), held that twenty-five percent of all state revenue stands appropriated for the support of public schools by action of Article IX, Section 3.

Applying the principles of these cases to the problem before us, we conclude that those provisions of Article IX, Section 5, dedicating certain money to the public school fund are self-executing, and that this money becomes part of the fund upon

receipt by the treasurer without the necessity of legislative action or appropriation, and it may be immediately invested by the State Board of Education. This conclusion is required because the Constitution allows no room for legislative discretion concerning this money. If money described by one of the categories enumerated in Section 5 is received by the state, the legislature does not have the power to devote it to any use other than the fund, and the legislature also lacks the power to decline to turn it over to the fund. Therefore, in the words of the City of Fulton case quoted above, "there is nothing to be done by the legislature to put it in operation."

This conclusion applies both to money accruing to the fund and to money already in the fund. When a bond held by the fund matures or is sold and the principal is returned to the fund, this money is not subject to legislative action. Rather, it, too, may be reinvested by the State Board of Education without an appropriation.

Therefore, it is our opinion that an appropriation by the legislature is never necessary with regard to money devoted by the Constitution to the corpus of the public school fund, since the constitutional provision creating the fund is self-executing.

II

The other problem raised by your opinion request is whether the State Board of Education has the power to sell securities held by the fund before they mature, and if so, does the State Board have the power to sell those securities at a loss.

The two statutory provisions relevant to our inquiry here are Sections 166.011 and 166.021, RSMo.*

Section 166.011, reads in part as follows:

" . . . All such funds shall be paid into the state treasury and securely invested by the state board of education, and sacredly preserved as a public school fund, the annual income of which shall be faithfully appropriated for establishing and maintaining free public schools and for no other uses or purposes whatsoever."

*It should be noted that the legislature retains power to regulate the operational details of a self-executing constitutional provision. State ex rel. City of Fulton v. Smith, supra.

Dr. Arthur L. Mallory

Section 166.021, reads as follows:

"1. All funds accruing to the state public school fund, except the interest on the fund, shall be invested by the state board of education in registered bonds of the United States or the state, bonds of school districts of the state, or bonds or other securities payment of which is fully guaranteed by the United States, of not less than par value.

"2. Whenever the state board of education contracts with the seller of any such bonds or securities, the board shall requisition and the state comptroller shall approve and forthwith issue a warrant upon the state treasurer for the purchase price agreed upon, payable out of the state public school fund, in favor of the seller.

"3. All bonds or securities so purchased shall be made payable to, or be registered in the name of, the state treasurer as trustee of the state public school fund and shall be deposited as part of the state public school fund with the state treasurer who shall give his receipt therefor to the board of education."

The limitations in Section 166.021(1) are intended to make the money invested in the fund as secure as possible by restricting investments to government bonds and government-guarantee securities, and then only to those bonds not selling at discount. The duties of the board are not limited to caring for the safety of the fund, however. The fund exists to produce income for the support of the public schools, Article IX, Section 5, and the board must see that the money is invested productively. Thus the board's duty is to purchase securities which will produce the maximum return consistent with the safety of the money in the fund.

This duty is a continuing one. The board's responsibilities with respect to the management of the public school fund are in many respects parallel to those of the trustee of another's funds, and a trustee must always monitor the money in his custody. As explained by Professor Scott in his treatise on the law of trusts:

Dr. Arthur L. Mallory

"The mere fact that when the trustee receives or makes an investment it is a proper trust investment does not relieve him of all further responsibility. He is under a duty to see whether it continues to be a proper trust investment. Ordinarily he need not make as complete an investigation as he was under a duty to make originally, and he need not watch the ticker as a speculator would. It is his duty, however, from time to time to examine the state of the investments to see whether any of them have become such that it is no longer proper to retain them.

"Where the investments, . . . have ceased to be proper investments, it becomes the duty of the trustee to dispose of them, within a reasonable time. . . ." III Scott, Law of Trusts, Third Edition, Sec. 231, p. 1882.

Therefore, when the board reviews the portfolio of the fund and concludes either that a security is no longer safe or that the income of the fund could be improved without increasing risk by shifting the fund's holdings, the board has the duty to dispose of the offending bonds or securities.

We believe further that the board may exercise this duty consistently with the Constitution and the statutes. Only two state courts have discussed the problem of the legal investment powers of the trustees of state school funds in recent years, and they reached exactly contrary conclusions. In Schelle v. Foss, 83 N.W. 2d 847 (S.D. 1957), the relevant constitutional provisions provided that the money in the funds "shall be invested by the Commissioner of Public Lands" and that "the principal [of the fund] shall forever remain inviolate, and may be increased but shall never be diminished. . . ." The court held that the first of these provisions contained no implied power to sell securities once they are purchased, and that in any event the second prohibited a sale for less than the purchase price. In In re Montana Trust and Legacy Fund, 388 P.2d 366 (Mont. 1964), on the other hand, the court held that a constitutional provision stating that the "public school fund shall forever remain inviolate, guaranteed by the state against loss or diversion, to be invested, so far as possible, in public securities within the state," did not prohibit the sale of securities at a loss before maturity. Both of these cases cite the same precedents, and we have examined the legal reasoning of each; we believe the Montana case is more soundly reasoned.

Dr. Arthur L. Mallory

In discussing the implied power to sell securities as necessarily implied from the express power to make investments, the court in the Montana Trust and Legacy Fund case said:

" . . . we are aware of no cogent reason why the general authority of investment and administration of funds should not include the authority to administer investments in a manner consistent with the realities of the securities market. See 2 Scott, Trusts, § 186 (2d ed. 1956). Indeed, we should be most reluctant to announce a rule which would preclude the appropriate state authorities from being able to take advantage of a "better deal," so long as it may likewise be classed as a safe and conservative investment. Because of the constitutional and statutory limitations respecting the type of securities which may be purchased, we do not believe our position throws the door open to dangerous speculation." 388 P.2d, at 370.

The court then discussed the problem of whether the constitutional requirement that the fund "remain inviolate" (similar to Missouri's requirement that it be "sacredly preserved") prevented sales of securities at a loss:

" . . . The question presented by these provisions is whether the announced rule of inviolability of the funds is an absolute prohibition against the incurrence of a short term diminution of principal (by selling securities at less than face value or purchasing at a premium). We conclude the answer is in the negative. Bearing in mind that the purpose of the funds is to help finance this state's educational institutions with income generated therefrom, we do not believe the framers of the Constitution intended to establish a rule which could, under some circumstances, defeat that purpose. There is no doubt but that the varying yield values of different securities render it prudent at times to take a temporary loss of principal in return for a greater realization of income (of course, the measurement of income yield must be made in light of the necessity of allocating a

Dr. Arthur L. Mallory

portion thereof to restoration of lost principal.) Therefore, we do not construe the word 'inviolable' as prohibiting the sale of securities at less than purchase price or face value or the purchase thereof at a premium, provided the income gain resulting from such transactions is partially used to restore the temporary loss of principal. . . ."
388 P.2d, at 370.

The allocation of interest to the restoration of principal does not violate the constitutional command that the income of the fund be appropriated for establishing and maintaining free public schools. The Montana court discussed this problem in the following language:

"We are mindful of the following sentence in Section 12, Article XI, Constitution of Montana:

'The interest of said invested funds [of the state educational institutions] * * * shall be devoted to the maintenance and perpetuation of these respective institutions'. In our opinion, this mandate is satisfied whether the interest is devoted directly or indirectly to the maintenance and perpetuation of those institutions. In other words, we [do] not believe the constitutional requirement is violated by an allocation of some interest toward restoration of a temporary loss of principal when the overall effect of the plan is to improve the income posture of the funds. Such allocation of income is certainly, in the long run, in the interest of maintaining and perpetuating the institutions for whose benefit the funds exist."
388 P.2d, at 371.

Accord, Moses v. Baker, 299 N.W. 315, 316, 317 [2] (N.D. 1941).

We find the same considerations which guided the Montana court to be present here. Interest rates are at historically high levels, and we are advised that the sale of some of the older securities will increase the total income of the fund substantially without any long-term depletion of the corpus of the fund. We believe that the powers given to the State Board

Dr. Arthur L. Mallory

of Education by the Constitution would permit it to sell securities with low interest rates and purchase securities with higher interest rates so long as a portion of the increased income is used to replenish the principal over a reasonable span of years. Although Sections 166.011 and 166.021, RSMo 1969, contain language which could be read as in conflict with the Constitution on this point, these sections may be fairly construed consistently with the constitutional grant of authority to sell securities, and where more than one construction of a statute is possible, that one most in accord with the Constitution should be adopted. State ex rel. State Highway Commission v. Paul, 368 S.W.2d 419 (Mo. Banc 1963). Therefore, we conclude that the State Board of Education may exercise all the powers granted to it in Article IX of the Constitution.

CONCLUSION

It is, therefore, the opinion of this office that the State Board of Education may invest money accruing to or currently in the public school fund pursuant to Article IX, Section 5 of the Missouri Constitution without first securing an appropriation from the General Assembly, that the State Board of Education may sell securities held by the public school fund before those securities mature, and that it may sell those securities at less than their original cost to the fund if a portion of the interest received from the securities purchased with the proceeds is devoted to replenishment of the principal of the fund.

This opinion, which I hereby approve, was prepared by my assistant, Richard E. Vodra.

Very truly yours,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH
Attorney General

June 6, 1974

OPINION LETTER NO. 20
Answer by letter-Wood

Herbert R. Domke, M.D.
Director, Missouri Division
of Health
Broadway State Office Building
Jefferson City, Missouri 65101



Dear Dr. Domke:

This letter is in response to your request that we review and comment on the current validity of two previous opinions of this office, namely Attorney General's Opinion No. 60 dated March 22, 1935, to E. T. McGaugh and Attorney General's Opinion No. 2 dated May 1, 1953, to James R. Amos. You further request our opinion on the question of whether the birth record of an illegitimate child can be subsequently amended so as to change the child's last name.

The 1935 opinion expressed the view that, based on the common law doctrine of nullius filius (the child of no one), an illegitimate child had no lawful right to any last name. We do not believe this view reflects the present law of Missouri, and we are therefore withdrawing the 1935 opinion.

The 1953 opinion holds that the mother of an illegitimate child is entitled to designate the child's last name for purposes of birth registration, which does not necessarily have to be the mother's last name at the time of birth.

We are not aware of any law or judicial decision in this state requiring that on the birth certificate of an illegitimate child the mother's surname and the child's surname must coincide. Accordingly, we adhere to the views expressed in the 1953 opinion.

Section 193.200, RSMo, provides as follows:

Herbert R. Domke, M.D.

"A person born in this state, or a resident of Missouri born outside of this state whose birth is not recorded in any other state, may file, or amend a certificate after the time herein prescribed, upon submitting such proof as shall be required by the division, or by any court."

In view of this statute, we believe that regulations may be adopted (Section 193.030, RSMo) setting forth procedures and requirements for the administrative amendment of a birth record. However, the request for the amendment must be made by the person whose birth is the subject of the record (see enclosed copy of Attorney General's Opinion No. 2 dated April 21, 1953, to James R. Amos).

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 2
4-21-53, Amos



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

March 25, 1974

OPINION LETTER NO. 22

Answer by Letter - Boicourt

Honorable Donald L. Manford
State Senator, 8th District
1000 Commerce Building
Kansas City, Missouri 64106

FILED

22

Dear Senator Manford:

You have requested an official Attorney General's Opinion on the following legal questions:

"Do military personnel assigned to active official duties within and who reside within (off of base facilities) and those who are not residents of Kansas City, Missouri, or a resident of the State of Missouri elsewhere, have to purchase 'city stickers' for their motor vehicles." [Emphasis yours.]

We have requested, and received, from the Office of City Counselor of Kansas City, Missouri, the enclosed advisory opinion. We refer you to the conclusions made by the Kansas City City Counselor's Office. In that Kansas City has taken the position that it will not require service men on active duty to pay city motor vehicle license taxes or to display city motor vehicle stickers, we believe that it is unnecessary for this office to prepare a formal written opinion responding to your request. In effect, the Kansas City City Counselor has totally resolved the issues raised in your opinion request.

Sincerely,

JOHN C. DANFORTH
Attorney General

Enclosure



Office of City Counselor

City of Kansas City, Missouri
Heart of America

28th Floor, City Hall
Kansas City, Missouri 64106

816 274 2512

February 1, 1974

Honorable C. B. Burns, Jr.
Assistant Attorney General
State of Missouri
Jefferson City, Missouri 65101

Re: City Vehicle Licenses -
Members of Armed Forces -
Legal Opinion

Dear Mr. Burns:

This advisory opinion is directed to the following question, submitted to your office by Senator Don Manford:

"Do military personnel assigned to active official duties within and who reside within (off of base facilities) and those who are not residents of Kansas City, Missouri, or a resident of the State of Missouri elsewhere, have to purchase 'city stickers' for their motor vehicles?"

I.

ONLY RESIDENTS OF KANSAS CITY WHO ARE OWNERS OF MOTOR VEHICLES ARE REQUIRED TO PURCHASE CITY VEHICLE LICENSES.

Section 301.340, R.S.Mo., authorizing municipalities to levy and collect license taxes from owners of and dealers in motor vehicles, by its own terms limits that authority to those "residing in such municipalities". This language has been upheld, in its common meaning, in Frankford v. Davis, App. 1961, 348 SW2d 553, Sikeston v. Marsh, App. 1938, 110 SW2d 1135, and Fredericktown v. Hunter, App. 1955, 273 SW2d 732. Accordingly, military personnel, like others, are not subject to city licensing requirements, if they are non-residents of the city.

In this connection, compare Section 301.020, R.S.Mo., relating to State registration, requiring every owner of a motor vehicle which shall be operated or driven upon the highways of this state, except as otherwise expressly

provided in the statute, to apply for state registration, and Section 301.271, excepting from the requirement non-resident owners of vehicles displaying the plate issued in the place of residence of the owner, to the extent that such state extends substantially equivalent exemptions to Missouri residents for the operation in that state of vehicles registered in Missouri. Under this act, not only residents, but non-residents not exempted by the reciprocity clause, are required to register their car in Missouri and pay the fees therefor.

II.

SERVICEMEN ON ACTIVE DUTY, LIKE OTHER NON-RESIDENTS OF THE CITY, MAY ESTABLISH A RESIDENCE IN KANSAS CITY, BUT THE MEASURE OF THE PROOF OF THAT FACT REMAINS UNCLEAR.

Generally, residence or domicile is determined by the coincidence of being present in a jurisdiction with an intention to make such jurisdiction one's permanent home. There appears to be no reason why a serviceman, like any other non-resident, may not assume, as his permanent domicile, the jurisdiction in which he is physically located. The measure of the proof required with respect to a serviceman, however, remains unclear.

In Dameron v. Brodhead, USSC 1953, 355 US 322, 97 L. Ed. 1041, 73 S. Ct. 721, 32 ALR2d 612, the serviceman, claiming domicile in Louisiana where he remained a registered voter, was assigned duty in Colorado, where he lived in a rented apartment. The Court sustained his exemption under the Soldiers' and Sailors' Civil Relief Act, from the exaction of personal property taxes, although he had paid none in his home state. Obviously, the Act could not have applied had he become a resident of Colorado.

In Woodroffe v. Park Forest, (DC Ill. 1952) 107 F. Supp. 906, the serviceman, assigned duty in Chicago, had resided in rented housing for more than three years, and had voted in a Park Forest school election in which the statutes provided only residents of the state were permitted to vote. He claimed residence in Pennsylvania, first at the home of his parents whence he had been recalled to active duty, then in that state at the home of a boyhood friend, where he visited two or three times a year, received mail, always had a room available to him. He filed his federal income tax returns, maintained his bank account, and obtained state car plates in Pennsylvania, and from that state had received a soldier's bonus in 1950. In this action, involving city vehicle license plates, the Court sustained the non-taxability (and non-residence) of the serviceman.

Thus, the measure of proof remains unclear. When military records indicate maintenance of the domicile elsewhere, in my opinion this would, under the Soldiers' and Sailors' Civil Relief Act, constitute prima facie evidence of non-residency, subject to rebuttal by facts to the contrary. Registration of the vehicle in Missouri would probably not be material, for reasons

indicated herein, infra, but local voting registration, establishment of a local business, and expression of an intent to remain permanently, would be. It is doubtful that the burden of developing such evidence would be justified by the fees thus collected, particularly in view of comments, infra, concerning the measure of the fee legally collectible.

III.

THE PROTECTION OFFERED SERVICEMEN BY THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT APPLIES TO CITIES AS WELL AS STATES.

Sec. 514 of the Act (Sec. 574, Title 50 Supp., USCA), provides, in part:

"For the purposes of taxation in respect of any person, or of his personal property...by any State, Territory, possession, or political subdivision of any of the foregoing, such person shall not be deemed to have lost a residence or domicile in any State, Territory, possession, or political subdivision of any of the foregoing...solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become resident in or a resident of, any other State, Territory, possession, or political subdivision of any of the foregoing,...while, and solely by reason of being, so absent. For the purposes of taxation in respect of the personal property, ...of any such person by any State, Territory, possession, or political subdivision of any of the foregoing,... of which such person is not a resident or in which he is not domiciled,...personal property shall not be deemed to be located or present in or to have a situs for taxation in such State, Territory, possession or political subdivision,... Where the owner of personal property is absent from his residence or domicile solely by reason of compliance with military or naval orders, this section applies with respect to personal property, or to the use thereof, within any tax jurisdiction other than such place or residence or domicile, regardless of where the owner may be serving in compliance with such orders: Provided, That nothing contained in this section shall prevent taxation by any State, Territory, possession or political subdivision of any of the foregoing...in respect of personal property used in or arising from a trade or business, if it otherwise has jurisdiction...

"When used in this section, (a) the term 'personal property' shall include tangible and intangible property (including motor vehicles) and (b) the term 'taxation' shall include but not be limited to licenses, fees, or excises imposed in respect to motor vehicles or the use

thereof: Provided, That the license, fee, or excise required by the State, Territory, possession or District of Columbia of which the person is a resident or in which he is domiciled has been paid."

It is worthy of note, at this point, that with respect to licenses, fees or excises with respect to motor vehicles or their use, the prohibition applies to States and to their subdivisions, while the proviso relating to the registration of motor vehicles in the place of domicile applies only to the State, and not to any subdivision thereof. Clearly, failure of a serviceman to register his vehicle in the state of his domicile may give the host state the right to require registration, but failure to register the vehicle in the city of his domicile appears to be immaterial.

In Whiting v. Portsmouth, S. Ct. App. Va. 1961, 202 Va. 609, 118 SE2d 505, defendant was fined for failure to register and license his vehicle in the City of Portsmouth. He purchased his car in Virginia, and registered it there under Virginia statutes. He was in Portsmouth on naval assignment, claimed Colorado as his domicile, but stated he planned to purchase property and reside in Mississippi upon his retirement from the service. The city license fee was a flat fee of \$10.00. State law empowered cities to charge license fees for motor vehicles; it does not appear whether the enabling act restricts the power to residents; but the ordinance requires every person having a place of residence in the City to pay the annual tax. In sustaining the conviction, the Court concluded that, since defendant had not paid a State license tax in the state of his residence, and since the license tax involved was not a property tax, but an excise tax assessed for the privilege of using the car on the streets of the city, he was not exempt under the Act. Note that this case is apparently criticized in California v. Buzard, *infra*.

In Stephenson v. Curtis, Sup. Jud. Ct. Me. 1968, 238 A2d 613, the State imposed a flat state registration fee of \$15.00, but made payment of city taxes a prerequisite to state registration. The city fee was an excise for the privilege of operating the vehicle on the public ways, and, being based upon value of the vehicle, reflecting list price and year, was in lieu of personal property taxes on the car. The action was brought by a number of military personnel stationed in Maine who desired to register their cars with the state without payment of the required city taxes. In sustaining their position, the Court noted that the entire proceeds went to the general revenues of the cities, and in no way served to enforce registration and licensing statutes, and held that the city tax partook of the nature of a property tax within the scope of the Soldiers' and Sailors' Civil Relief Act, but, for other purposes, remained an excise tax.

These cases leave the law unclear as to the legality of imposing a city vehicle license fee; at the most, it may be said

that such fees may be levied as a part of the delegated power of the State, providing such fees, taken together with state registration fees, are otherwise in accordance with the provisions of the Act. Certainly, municipalities could have no greater powers than the states which created them.

IV.

LEGALITY AND MEASURE OF VEHICLE LICENSE FEES OF STATES.

In California v. Buzard, USSC 1966, 382 US 386, 86 S. Ct. 478, 15 L. Ed2d 435, defendant, a resident of the State of Washington, was on duty in California. While on temporary duty in Alabama, he purchased a car and registered it there. He did not register it in Washington, which required registration only as a prerequisite to use upon the state highways of that state. California sought to require its registration under its law, which required, first, a flat fee of \$8.00, and, second, as a prerequisite to registration, a further license fee equal to 2 percent of the market value of the car, imposed in lieu of ad valorem taxes. Defendant offered to pay the \$8.00, but was refused registration for failure to pay the 2 percent tax. His conviction for failure to register was reversed by the California Supreme Court, which held that, under the Soldiers' and Sailors' Civil Relief Act, defendant had paid fees then "required" by the State of Washington, although none were then "required."

The U. S. Supreme Court reversed the California Supreme Court decision, noting that Congress was concerned that servicemen should not drive unregistered or unlicensed cars, that every state requires registration and license plates, and that the words in the Act, "required by", were equivalent to license fees "of the" state of residence. Therefore, the Court held that a servicemen who has not registered his car and obtained plates under the laws of his home state, for whatever reason, may be required by the host state to register and license the car under its laws.

The Court also considered the measure of the fee, noting that a few states, like California, had fees based in part upon the value of the car, but that most based the fees on horsepower (as in Missouri) or upon weight or displacement. See footnote on p. 442, note 8.

The Court concluded that the license, fee or excise imposed in respect to motor vehicles or the use thereof, in the absence of payment of like exactions imposed by the non-resident serviceman's home state, refers only to those taxes which are essential to the functioning of the host state's licensing and registration laws, and that the test of the measure of the fee is whether the inclusion thereof in the federal immunity would deny the host state power to enforce the nonrevenue provisions of the state motor vehicle legislation. Thus, the Court held the serviceman immune from the 2 percent tax, being in the nature of an ad valorem tax, and made no specific ruling with regard to the

valorem tax, and made no specific ruling with regard to the \$8.00 exaction, as to whether it was necessary to enforce non-revenue provisions of the California act, in the absence of a State Supreme Court decision on that point. See footnote 11, p. 443.

The U. S. Supreme Court commented on the Buzard decision in Sullivan v. United States, 1969, 395 US 169, 89 S. Ct. 1648, 23 L. Ed2d 182, involving a different type of tax, stating:

"The Court held in Buzard that Sec. 514 exempted servicemen from the California tax on automobiles, not because it was an excise tax on use covered by subsection (2)(b), but rather because it was not such a tax. The so-called 'license fee' there in question was an annual tax in the amount of 2 percent of the assessed market value of the car - a levy which was indistinguishable from the annually recurring ad valorem taxes that Sec. 514 was designed to cover." (Emphasis the Court's.)

V.

NATURE OF MISSOURI REGISTRATION FEE STATUTE.

In State ex rel McClung v. Becker, banc 1921, 233 SW 54, the Missouri Supreme Court noted that Sec. 7604 of the Revised Statutes of 1919 provided that all registration fees from motor vehicles shall be paid to the treasurer for the benefit of state road funds, less the cost of administering the provisions of the chapter related to motor vehicles, and on this basis, found that that Section was avowedly a revenue measure.

Sec. 301.090, R.S.Mo., now provides that all fees for registration of motor vehicles shall be deposited with the state treasurer to the credit of the State Highway Department fund.

As to the effect of the Soldiers' and Sailors' Civil Relief Act on state registration fees, under the 1919 law, where the exaction was avowedly in excess of the amount required to administer the nonrevenue provisions of the law, Missouri's registration fees could probably not have been imposed upon servicemen, under the Act, at least not in excess of the cost of administering the non-revenue portions, under the law as announced in McClung and Buzard.

With respect to the present law, Missouri appears to be in the same position as California with respect to its \$8.00 flat registration fee, since the Courts of neither state have made any finding, under these laws, as to the amount of the fee required for administration of nonrevenue features of their registration laws.

VI.

NATURE OF KANSAS CITY VEHICLE LICENSE FEES.

While no Court ruling has been made with respect to the portion of city license fees required to administer the nonrevenue

provisions of the ordinance, I note that, under the program, the City does issue numerical stickers and maintain files reflecting identification of the car and its owner through sticker numbers, which may be a nonrevenue function, or may be merely a control to require payment of license fees and ad valorem taxes on the vehicles.

Whatever the nature of the function, the Finance Department has advised me that the City receives income amounting to \$1,600,000 to \$1,700,000 from city stickers, and that the cost of administering the city sticker program is from \$80,000 to \$100,000 annually. On these facts, it would be difficult to sustain the entire exaction, or even a major portion of it, as necessary to whatever nonrevenue functions the City may engage in through its licensing ordinance.

CONCLUSION

1. Persons who are not residents of Kansas City, whether in the military service or not, and without respect to whether they live on or off base facilities, and without respect to whether they are residents of Missouri elsewhere, may not be required to purchase city stickers for their cars.

2. Non-residents of the City, by their affirmative actions, whether in the military service or not, may become residents of the City.


3. Military records of servicemen physically residing in the City, which show that they maintain their domicile outside the City, are prima facie evidence of such domicile at the place so stated.

4. The prima facie presumption is rebuttable, but the measure of proof of City residency is uncertain, and the time and expense involved in marshalling evidence for such rebuttal is probably not justified by vehicle license fees that might be produced thereby.

5. The measure of a city sticker fee permitted by law in the case of a non-resident serviceman electing to register his car in Missouri probably is limited to the cost of administering the nonrevenue provisions of the City ordinance, and City ordinances now in effect fail to provide for any such reduced rate for non-resident servicemen.

6. When enforcement procedures, such as the "dawn patrol", (which tickets cars bearing Missouri plates but no city stickers in pre-dawn checks of apartment house parking lots, etc.), and such as tickets issued by the Police Department (to drivers of cars bearing Missouri plates but no city stickers and the driver's license indicates a residence address in Kansas City), result in the ticketing of servicemen's cars under circumstances in

which, under this opinion, the City has no authority to require the fee to be paid, such tickets should be dismissed administratively, and, if possible, without requiring the serviceman involved to make a court appearance. Coordination between the City Prosecutor and local military authorities is recommended.


Larry B. Saunders
Associate City Counselor

Approved:


Aaron A. Wilson
City Counselor

LBS:vh

cc: Robert A. Kipp, City Manager
John M. Urie, Director of Finance
Lawrence B. Bennett, Commissioner of Revenue
Louis W. Benecke, City Prosecutor



OFFICES OF THE

JOHN C. DANFORTH
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

April 2, 1974

OPINION LETTER NO. 23

Honorable John Twitty
Representative, District 130
Room 235B, Capitol Building
Jefferson City, Missouri 65101

Dear Representative Twitty:

This letter is in response to your request for an opinion on the following question:

"Should the Public Schools, through school boards, superintendents, or any teacher organizations, have the privilege or right to dictate to its employees, from whom, certain named companies or individuals, they must purchase their voluntary Tax Sheltered Annuity Contracts under Section 403(b) of the Internal Revenue Code in order for the school to honor them?"

Tax-sheltered annuities for public school teachers are authorized by Section 403(b) of the Internal Revenue Code of 1954, as amended. This section provides that the amounts contributed by an employer for an annuity contract will not be taxable to the employee as compensation at the time such contributions are made (within limits set in the statute and not relevant here). The regulations accompanying Section 403(b) state that the purchase of the annuity contract for a teacher may be made as a supplement to past or current compensation, or it may be made pursuant to an agreement by the teacher with the school to take a reduction in salary in exchange for the annuity. I.R.S. Reg. §1.403(b)-1(b)(3)(i). Therefore, the statement of your question presents a misunderstanding of the laws authorizing the annuities. The annuities are purchased by the school district pursuant to an agreement with the teachers and not by the teachers themselves; it is

Honorable John Twitty

this feature which allows the postponement of tax liability by the teachers.

Your opinion request inquires about the validity of certain restrictions allegedly placed on insurance companies desiring to sell annuity contracts to schools for the benefit of teachers. This office understands that the general practice of school districts is that once a board of education authorizes the procedure for the withholding of monies, companies which sponsor the tax sheltered annuity plans are then allowed to present their proposal to the teachers. Your opinion request indicates that, through the action of either the school board, the superintendent or a teachers' organization, certain insurance companies or agents are denied the opportunity to present proposals to the teachers and thereby are not allowed the opportunity to compete for the underwriting of tax sheltered annuity plans. The reason for this denial is not set out in your opinion request.

This office has recently conducted an investigation into the insurance purchasing practices of school districts relative to their fire, content, and vehicle coverages. The investigation disclosed that numerous school districts were limiting the companies which could compete for the underwriting of such coverages by establishing restrictions limiting competing companies to those which either reside in, pay taxes in or maintain offices in that school district. In response to the findings of the investigation, this office issued Advisory Guidelines which determined that such restrictions were contrary to state and federal restraint of trade laws. Opinion No. 275, Advisory Guidelines, 1973, copy enclosed.

However, your request does not indicate on what grounds specific companies are refused the opportunity to sell annuities in the district. Therefore, this office is unable to render a specific opinion on the validity of any such restrictions under state and federal laws including laws prohibiting the illegal restraint of trade.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 275,
Advisory Guidelines, 1973

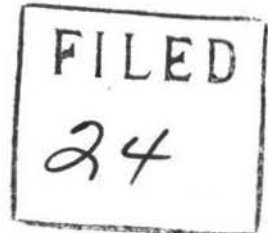
ROADS & BRIDGES:
STATE HIGHWAY DEPARTMENT:
OFFICE OF ADMINISTRATION:
COMMISSIONER OF ADMINISTRATION:
DIVISION OF DESIGN AND CONSTRUCTION:

The State Highway Department is subject to the provisions of Sections 8.310 and 8.320, RSMo 1969, and accordingly must obtain the formal approval of the Commissioner of Administration before letting contracts for repair, rehabilitation, or construction of buildings and facilities. The State Highway Department is not required to obtain the formal approval of the Commissioner of Administration before obtaining architectural documents, supervising construction, and performing maintenance and inspection, provided, however, that in carrying out these activities it must conform to the reasonable procedures outlined by the Commissioner of Administration pursuant to his rule-making authority under Section 8.320, RSMo 1969. The repair, maintenance, operation, construction, and administration of highways, bridges, and tunnels by the State Highway Department are not subject to the requirements of Sections 8.310 and 8.320, RSMo.

OPINION NO. 24

June 7, 1974

Honorable Christopher S. Bond
Governor of Missouri
Executive Offices
State Capitol Building
Jefferson City, Missouri 65101



Dear Governor Bond:

This opinion is given in response to your request for an official opinion, which request reads as follows:

"Does the State Highway Department have the power and authority to obtain architectural documents, let contracts for repair, rehabilitation or new construction of facilities, supervise construction, and perform inspection and maintenance of facilities without the approval of the Commissioner of Administration?"

Quite simply, the answer to this question hinges upon the applicability of Sections 8.310 and 8.320, RSMo 1969, to the State Highway Department. Section 8.310, RSMo 1969, reads in part as follows:

Honorable Christopher S. Bond

"The director of the division of planning and construction shall serve as advisor and consultant to all department heads in obtaining architectural plans, letting contracts, supervising construction, purchase of real estate, inspection and maintenance of buildings. No contracts shall be let for repair, rehabilitation or construction without approval of the director of the division of planning and construction, and no claim for repair, construction or rehabilitation projects under contract shall be accepted for payment by the state without approval by the director of the division of planning and construction; . . ."

Section 8.320 provides:

"The director of the division of planning and construction shall set forth reasonable conditions to be met and procedures to be followed in the repair, maintenance, operation, construction and administration of state facilities. The conditions and procedures shall be codified and filed with the secretary of state in accordance with the provisions of the constitution. No payment shall be made on claims resulting from work performed in violation of these conditions and procedures, as certified by the director of the division of planning and construction."

Since January 15, 1973, the duties of the director of the Division of Planning and Construction have been the responsibility of the Commissioner of Administration, established pursuant to Article IV, Section 12 of the Constitution of Missouri, as amended. See Section 26.300, RSMo Supp. 1973. However, Sections 8.310 and 8.320 remain otherwise unchanged.

On their face, then, these sections clearly purport to apply to the State Highway Department. Section 8.310 deals with "all department heads." Section 8.320 speaks in terms of "state facilities." Therefore, unless they irreconcilably conflict with some statutory or constitutional provision dealing specifically with the Highway Department, there can be no question that Sections 8.310 and 8.320 apply to that agency.

Honorable Christopher S. Bond

We have examined the constitutional and statutory provisions dealing with the Highway Department and have discovered no conflict. At the outset, it should be noted that the State Highway Commission constructs buildings from two different sources. The Commission's main building and its ten district offices, together with any substantial additions thereto, have always been built from legislative appropriations. Other buildings are built from the state road fund, which stands appropriated without legislative action. Article IV, Section 30(b) empowers the Highway Commission to expend state road funds, "[i]n the discretion of the commission . . ." to locate, relocate, establish, acquire, construct and maintain state highways, bridges, and tunnels in specified circumstances, and: "(4) To acquire materials, equipment and buildings necessary for the purposes herein described; . . ."

However, we see no reason to distinguish, for purposes of this opinion, between buildings constructed and maintained with legislative appropriations and those built with state road funds. The Highway Department, it is important to remember, draws its principal powers from Article IV, Section 29, which reads in part:

"The department of highways shall be in charge of a highway commission. . . . It shall have authority over the power to locate, relocate, design and maintain all state highways; and authority to construct and reconstruct state highways, subject to limitations and conditions imposed by law as to the manner and means of exercising such authority; . . ." (Emphasis added)

Although Article IV, Section 29, deals specifically with highways, and not buildings, its use of the qualifying phrase ". . . subject to limitations and conditions imposed by law as to the manner and means of exercising such authority; . . ." is highly significant, since there could be no clearer indication that the legislature is empowered to pass laws regulating the exercise of the Highway Department's broad constitutional powers. Of course, even aside from the qualifying language of Article IV, Section 29, it is well-settled that the General Assembly has the power to enact legislation regulating the exercise of a constitutional right. State ex rel. Randolph County v. Walden, 206 S.W.2d 979 (Mo. Banc 1947).

It is important to note that Sections 8.310 and 8.320 do not in any way attempt to circumscribe or encroach upon the Highway Commission's constitutionally-granted right to acquire and maintain

Honorable Christopher S. Bond

necessary buildings. Rather, these statutes simply seek to prescribe orderly and uniform procedures for the exercise of that right. It is our view, then, that Sections 8.310 and 8.320 do not conflict with Article IV, Section 29, Article IV, Section 30(b), or any other constitutional or statutory provision dealing with the Highway Department.

Such a view, it should be emphasized, is consistent with previous opinions of this office. In Opinion No. 43 issued to Robert L. Hyder on May 26, 1953 (copy enclosed), we held, among other things, that the Highway Department was required to secure the approval of the director of Public Buildings (the predecessor of the director of the Division of Design and Construction) before letting a contract for a contemplated state highway patrol warehouse, which was to be built with state road funds. This ruling was based upon an interpretation of Section 8.070, RSMo 1949, the provisions of which were almost identical to the provisions of Section 8.310. Subsequently, in Opinion No. 43 issued to Robert L. Hyder on May 7, 1959 (copy enclosed) this office reaffirmed its 1953 holding, and ruled that a contract for the contemplated construction and rehabilitation of highway department offices fell within the scope of Section 8.310.

More recently, in Opinion No. 25 issued to you on March 7, 1974, we held that the Department of Conservation was subject to the requirements of Sections 8.310 and 8.320. And on May 28, 1974, in Opinion No. 28, we held that the University of Missouri and the other state universities, although exempt from the provisions of Section 8.310 by an exception contained therein, were nevertheless subject to the requirements of Section 8.320.

In view of the previous opinions of this office and our foregoing analysis of Sections 8.310 and 8.320, it remains our opinion that the Highway Department is subject to the requirements of these sections and must, therefore, obtain the approval of the Commissioner of Administration before letting contracts for repair, rehabilitation, or construction of state buildings and facilities. However, although Section 8.310 directs that the Commissioner of Administration serve as "advisor and consultant" to all department heads in obtaining architectural plans, supervising construction, and performing maintenance and inspection, it does not require that the Commissioner of Administration formally approve these activities. Therefore, we believe that the State Highway Department is not required to obtain the formal approval of the Commissioner of Administration before obtaining architectural documents, supervising construction, and performing maintenance and inspection, provided it otherwise conforms with the regulations promulgated by the Commissioner pursuant to

Honorable Christopher S. Bond

Section 8.320, which authorizes him to "... set forth reasonable conditions to be met and procedures to be followed in the repair, maintenance, operation, construction and administration of state facilities. . . ."

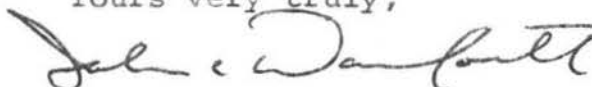
Finally, by way of clarification, we note that while the terms "buildings" and "facilities" as used in Sections 8.310 and 8.320 are not defined, common sense and usage would indicate that the legislature clearly did not intend to include highway, bridges, or tunnels within the scope of these two terms. It is, of course, a cardinal rule of statutory construction that words within statutes should be given their normal and ordinary meaning unless a contrary meaning plainly appears. Derboven v. Stockton, 490 S.W.2d 301 (Mo.Ct.App. at K.C. 1972).

CONCLUSION

It is our opinion that the State Highway Department is subject to the provisions of Sections 8.310 and 8.320, RSMo 1969, and accordingly must obtain the formal approval of the Commissioner of Administration before letting contracts for repair, rehabilitation, or construction of buildings and facilities. The State Highway Department is not required to obtain the formal approval of the Commissioner of Administration before obtaining architectural documents, supervising construction, and performing maintenance and inspection, provided, however, that in carrying out these activities it must conform to the reasonable procedures outlined by the Commissioner of Administration pursuant to his rule-making authority under Section 8.320, RSMo 1969. The repair, maintenance, operation, construction, and administration of highways, bridges, and tunnels by the State Highway Department are not subject to the requirements of Sections 8.310 and 8.320, RSMo.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Philip M. Koppe.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 43
5-26-53, Hyder

Op. No. 43
5-7-59, Hyder

CONSERVATION:
OFFICE OF ADMINISTRATION:
DIVISION OF DESIGN AND
CONSTRUCTION:

The Department of Conservation is subject to the provisions of Sections 8.310, RSMo 1969, and Section 8.320, RSMo 1969, and accordingly must obtain the formal approval of the Commissioner

of Administration before letting contracts for repair, rehabilitation or construction of state facilities. The Department of Conservation is not required to obtain the formal approval of the Commissioner of Administration before obtaining architectural documents, supervising construction, and performing inspection and maintenance, but its procedures in carrying out these activities must conform to the reasonable procedures outlined by the Commissioner of Administration, pursuant to his authority under Section 8.320, RSMo 1969.

OPINION NO. 25

March 7, 1974



Honorable Christopher S. Bond
Governor of Missouri
Room 216 Capitol Building
Jefferson City, Missouri 65101

Dear Governor Bond:

This opinion is given in response to your request of July 24, 1973, for an official opinion, which request reads as follows:

"Does the Department of Conservation have the power and authority to obtain architectural documents, let contracts for repair, rehabilitation or new construction of facilities, supervise construction, and perform inspection and maintenance of facilities without the approval of the Commissioner of Administration?"

This question necessarily involves an examination of several state constitutional and statutory provisions.

Article IV, Section 40 of Missouri's Constitution provides, in part, as follows:

"The control, management, restoration, conservation and regulation of the bird, fish, game, forestry and all wildlife resources of the state, including hatcheries, sanctuaries, refuges, reservations and all other property owned, acquired or used for such purposes and the acquisition and establishment thereof, and the administration of all laws pertaining thereto, shall be vested in a conservation commission."

Section 44 of Article IV further provides:

"Sections 40-43, inclusive, of this article shall be self-enforcing, and laws not inconsistent therewith may be enacted in aid thereof. All existing laws inconsistent with this article shall no longer remain in force or effect."

Section 8.310, RSMo 1969, provides in part:

"The director of the division of planning and construction shall serve as advisor and consultant to all department heads in obtaining architectural plans, letting contracts, supervising construction, purchase of real estate, inspection and maintenance of buildings. No contracts shall be let for repair, rehabilitation or construction without approval of the director of the division of planning and construction, and no claim for repair, construction or rehabilitation projects under contract shall be accepted for payment by the state without approval by the director of the division of planning and construction; . . ."

Section 8.320, RSMo 1969, uses similar language:

"The director of the division of planning and construction shall set forth reasonable conditions to be met and procedures to be followed in the repair, maintenance, operation, construction and administration of state facilities. The conditions and procedures shall be codified and filed with the secretary of state in accordance with the provisions of the constitution. No payment shall be made on claims resulting from work performed in violation of these conditions and procedures, as certified by the director of the division of planning and construction."

On August 8, 1972, the amendment of Article IV, Section 12, of Missouri's Constitution authorized the creation of the office of Commissioner of Administration. The function of the Commissioner of Administration is outlined by Section 26.300, RSMo Supp. 1971. Paragraph 3 of Section 26.300 provides as follows:

"3. The commissioner of administration shall, by virtue of his office, without additional compensation, head the division of budget and comptroller, the division of procurement, the division of planning and construction, and the administrative services section which are transferred to the office of administration on January 15, 1973. Whenever provisions of the statutes grant powers, impose duties or make other reference to the comptroller, the director of the budget, the director of the division of planning and construction, state purchasing agent, or the director of administrative services, they shall be construed as referring to the commissioner of administration."

At the outset it should be emphasized that neither the constitutional amendment authorizing the creation of the office of Commissioner of Administration nor the language of Section 26.300 in any way alter the scope or application of Sections 8.310 and 8.320. The effect is simply one of substitution. Whatever duties or obligations the director of the Division of Planning and Construction had prior to January 15, 1973 (the effective date of Section 26.300) now have become the responsibility of the Commissioner of Administration. Likewise, Section 26.300(3) serves only to designate the Commissioner of Administration the administrative head of the Division of Budget and Comptroller, the Division of Procurement, the Division of Planning and Construction and the Administrative Services Section. In no way do such statutory provisions make the Commissioner of Administration the administrative head of any other department within the executive branch of Missouri's state government.

The answer to the question, then, hinges on the issue of whether the provisions of Sections 8.310 and 8.320 are "inconsistent" with the provisions of Article IV, Section 40, of Missouri's Constitution. If they are inconsistent, it is clear from the language of Article IV, Section 44, that they are of no force or effect, insofar as they purport to apply to the Conservation Commission.

However, we have concluded that the provisions of Section 8.310 and Section 8.320 can be reconciled with the grant of authority given to the Conservation Commission by Article IV, Section 40 of Missouri's Constitution.

We are aided in making this determination by the well-recognized rule of law that a presumption of validity attaches to legislative enactments and a statute will never be held invalid unless it plainly appears that the legislature has transcended its power in passing it. State v. Hake, 14 Mo. App. 575 (1884). In addition it has been repeatedly held that the Missouri Constitution is not a grant but a limitation on legislative power, and except for the limitations imposed thereby, the power of the state legislature is unlimited and practically absolute. Kansas City v. Fishman, 241 S.W.2d 377 (1951); State ex inf. Dalton ex rel. Holekamp v. Holekamp Lumber Co. 340 S.W.2d 678, appeal dismissed 81 S.Ct. 1660, 366 U.S. 715, 6 L.Ed.2d 846, rehearing denied 82 S.Ct. 26, 368 U.S. 870, 7 L.Ed.2d 71.

Furthermore, although we have not found any cases or previous opinions of the Attorney General directly in point, the Attorney General has on at least three occasions been called upon to answer similar questions.

On October 18, 1937, in Opinion No. 9 rendered to George Blowers, the State Purchasing Agent, the Attorney General ruled that the constitutional mandate giving the Conservation Commission "the control, management, restoration, conservation and regulation of the bird, fish, game, forestry and all wildlife resources of the state" did not exempt the Conservation Commission from the operation of the State Purchasing Agent Act, which required that the purchasing agent buy the supplies for the state government agencies.

In the course of this opinion, the Attorney General concluded ". . . It would appear that the reasonable construction to be given the Conservation Commission Act is that the control, management, etc. of the wildlife resources of the State as set forth therein is vested in said Commission, and the legislature may enact any and all laws as its wisdom dictates, except such as would by fair construction be inconsistent with a specific provision of the act creating said commission and except that the administration of the laws regulating the wildlife resources shall not be taken away from said commission."

The opinion was affirmed with little comment on October 9, 1968 by the Attorney General in response to a request from State Representative E. J. Cantrell.

The Attorney General also has ruled in Opinion No. 9 to Mr. Blowers on December 20, 1937, that notwithstanding the broad grant of authority given the Conservation Commission by Article IV, Section 40, the Commission was nevertheless subject to the State Printing Act.

We are of the opinion that the above-cited opinions remain valid. Furthermore, we feel a close reading of the applicable

state constitutional and statutory provisions compels the same conclusion.

Article IV, Section 40 insures that the "control, management, restoration and regulation" of all the state's wildlife is vested in the Conservation Commission, along with "the administration of all laws relating thereto." The fair meaning to be placed on that provision is that it guarantees that the administration of the wildlife resources of the state shall not be removed or eroded by legislative act, but that the legislature may enact laws regulating the manner in which the Commission may acquire or deal with property so long as such legislation is not inconsistent with the constitutional grant of authority.

There is, in our opinion, nothing in Sections 8.310 or 8.320 that is inconsistent with the powers granted to the Conservation Commission by Article IV, Section 40. Basically, Sections 8.310 and 8.320 require that contracts for the repair, rehabilitation or construction shall be approved by the Commissioner of Administration (formerly the Director of the Division of Planning and Construction) and that the procedures to be followed in the repair, maintenance, operation, construction and administration of state facilities must follow "reasonable" guidelines to be set out by him. There is nothing in the statutory language that would in any way divest the Conservation Commission of its "control, management, restoration, conservation and regulation" of the state's wildlife resources. The statutes simply seek to prescribe orderly and uniform procedures for the exercise of that control. That being the case, there is nothing in the language of either Section 40 or Section 44 of Article IV that exempts the Conservation Commission from the scope of Sections 8.310 and 8.320.

Although we have decided that Sections 8.310 and 8.320 are applicable to the Conservation Commission, that is not completely determinative of the specific question we have been called upon to answer, which was: "Does the Department of Conservation have the power and authority to obtain architectural documents, let contracts for repair, rehabilitation or new construction of facilities, supervise construction, and perform inspection and maintenance of facilities without the approval of the Commissioner of Administration?" A close examination of Section 8.310 reveals that while the statute imposes a duty upon the Commissioner of Administration to serve as "advisor and consultant" in all of those above-mentioned matters, the statute actually requires formal approval only as to contracts "let for repair, rehabilitation or construction." Consequently, the Department of Conservation may obtain architectural documents, supervise construction, and perform inspection and maintenance of facilities without formal approval of the commissioner provided the

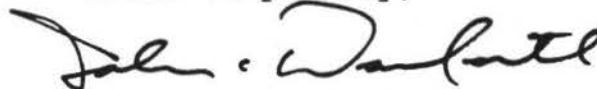
Department's procedures in doing so conform to whatever reasonable conditions and procedures have been set by the Commissioner of Administration, pursuant to his authority under Section 8.320.

CONCLUSION

It is our opinion that the Department of Conservation is subject to the provisions of Section 8.310, RSMo 1969, and Section 8.320, RSMo 1969, and accordingly must obtain the formal approval of the Commissioner of Administration before letting contracts for repair, rehabilitation or construction of state facilities. The Department of Conservation is not required to obtain the formal approval of the Commissioner of Administration before obtaining architectural documents, supervising construction, and performing inspection and maintenance, but its procedures in carrying out these activities must conform to the reasonable procedures outlined by the Commissioner of Administration, pursuant to his authority under Section 8.320, RSMo 1969.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Philip M. Koppe.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

March 19, 1974

JOHN C. DANFORTH
ATTORNEY GENERAL

OPINION LETTER NO. 26

Honorable Christopher S. Bond
Governor of Missouri
Executive Office
State Capitol Building
Jefferson City, Missouri 65101

Dear Governor Bond:

This is in answer to your opinion request concerning the responsibilities of the Commissioner of Administration in relation to the Division of Employment Security. Your specific inquiry asked whether the Division of Employment Security has the power and authority to obtain architectural documents, let contracts for repair, rehabilitation or new construction of facilities, supervise construction, and perform inspection and maintenance of facilities without the approval of the Commissioner of Administration.

We refer your attention to Opinion No. 25 rendered March 7, 1974 (copy enclosed), which held that the Conservation Commission was not empowered or authorized to let contracts for repair, rehabilitation or new construction of facilities without the approval of the Commissioner of Administration but that the Conservation Commission need not secure formal approval of the Commissioner of Administration before obtaining architectural documents, supervising construction and performing inspection and maintenance provided that the procedures in carrying out such activities conform to the reasonable procedures outlined by the Commissioner pursuant to his rule-making authority under Section 8.320, RSMo 1969.

We have specifically examined Sections 286.130 and 288.220, RSMo 1969, relating to the power and duties of the Division of

Honorable Christopher S. Bond

Employment Security and can find nothing therein or in any other statutory provisions of Missouri constitutional provisions that would cause us to reach a different conclusion with respect to the Division of Employment Security.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 25
3-7-74, Bond

March 19, 1974

OPINION LETTER NO. 27
Answer by letter-Koppe

Honorable Christopher S. Bond
Governor of Missouri
Executive Office
State Capitol Building
Jefferson City, Missouri 65101



Dear Governor Bond:

This is in answer to your opinion request concerning the responsibilities of the Commissioner of Administration in relation to the Missouri State Park Board. Your specific inquiry asked whether the State Park Board has the power and authority to obtain architectural documents, let contracts for repair, rehabilitation or new construction of facilities, supervise construction, and perform inspection and maintenance of facilities without the approval of the Commissioner of Administration.

We refer your attention to Opinion No. 25 rendered March 7, 1974 (copy enclosed), which held that the Conservation Commission was not empowered or authorized to let contracts for repair, rehabilitation or new construction of facilities without the approval of the Commissioner of Administration, but that it need not secure formal approval of the Commissioner of Administration before obtaining architectural documents, supervising construction and performing inspection and maintenance, provided that its procedures in carrying out such activities conformed to the reasonable procedures outlined by the Commissioner pursuant to his authority under Section 8.320, RSMo 1969.

We have specifically examined Section 253.040, RSMo 1969, which relates to the power and duties of the Missouri State Park

Honorable Christopher S. Bond

Board and can find nothing therein or in any other statutory provisions or Missouri constitutional provisions that would cause us to reach a different conclusion with respect to the Park Board.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 25
3-7-74, Bond

STATE UNIVERSITY:
DEPARTMENT OF EDUCATION:
OFFICE OF ADMINISTRATION:
COMMISSIONER OF ADMINISTRATION:
DIVISION OF DESIGN AND CONSTRUCTION:

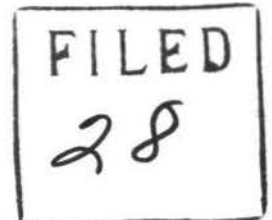
The Department of Education must obtain formal approval of the Commissioner of Administration before letting contracts for repair, rehabilitation, or construction of

facilities. It need not obtain formal approval before obtaining architectural documents, supervising construction, or performing inspection and maintenance, provided its procedures in carrying out these activities conform to the procedures the Commissioner of Administration has outlined pursuant to his rule-making authority under Section 8.320. The state universities, including the University of Missouri, have the power and authority to obtain architectural documents, let contracts for repair, rehabilitation or new construction of facilities, supervise construction, and perform inspection and maintenance of facilities without the approval of the Commissioner of Administration, once the necessary funds have been appropriated by the legislature for the performance of such activities. These institutions, however, are subject to the provisions of Section 8.320.

OPINION NO. 28

May 28, 1974

Honorable Christopher S. Bond
Governor of Missouri
Executive Office
State Capitol Building
Jefferson City, Missouri 65101



Dear Governor Bond:

This opinion is given in response to your recent request for an official opinion on the question of whether the Department of Education and the state universities, including the University of Missouri, have the power and authority to obtain architectural documents, contracts for repair, rehabilitation, or new construction of facilities, supervise construction, and perform inspection and maintenance of the facilities without the approval of the Commissioner of Administration.

Your question necessarily requires an examination of several state statutory provisions.

Section 8.310, RSMo 1969, provides:

"The director of the division of planning and construction shall serve as advisor

Honorable Christopher S. Bond

and consultant to all department heads in obtaining architectural plans, letting contracts, supervising construction, purchase of real estate, inspection and maintenance of buildings. No contracts shall be let for repair, rehabilitation or construction without approval of the director of the division of planning and construction, and no claim for repair, construction or rehabilitation projects under the contract shall be accepted for payment by the state without approval by the director of the division of planning and construction; except that after the need for the construction, repair, maintenance or improvement of any building or facility serving a state institution of higher learning has been determined and the proposed construction or improvement has been approved as a part of the state's building program by the division of planning and construction and has been authorized by the general assembly and the governor through a proper appropriation, the boards of curators of the state university and Lincoln University and the several boards of regents of the state colleges may contract for architectural and engineering services for the design and supervision of the construction, repair, maintenance or improvement of educational buildings or institutions and may contract for construction, repair, maintenance or improvement." (emphasis added)

Section 8.320, RSMo 1969, is also applicable. It provides:

"The director of the division of planning and construction shall set forth reasonable conditions to be met and procedures to be followed in the repair, maintenance, operation, construction and administration of state facilities. The conditions and procedures shall be codified and filed with the secretary of state in accordance with the provisions of the constitution. No payment shall be made on claims resulting from work performed in violation of these conditions and procedures, as certified by the director of the division of planning and construction." (emphasis added)

Honorable Christopher S. Bond

On August 8, 1972, the amendment of Article IV, Section 12 of Missouri's Constitution authorized the creation of the Office of the Commissioner of Administration. The function of the Commissioner of Administration is outlined by Section 26.300, RSMo Supp. 1971. Paragraph 3 of Section 26.300 provides as follows:

"3. The commissioner of administration shall, by virtue of his office, without additional compensation, head the division of budget and comptroller, the division of procurement, the division of planning and construction, and the administrative services section which are transferred to the office of administration on January 15, 1973. Whenever provisions of the statutes grant powers, impose duties or make other reference to the comptroller, the director of the budget, the director of the division of planning and construction, state purchasing agent, or the director of administrative services, they shall be construed as referring to the commissioner of administration."

As we recently pointed out in Opinion No. 25, issued to you on March 7, 1974, neither the constitutional amendment authorizing the creation of the Office of the Commissioner of Administration nor the language of Section 26.300 in any way expands or restricts the scope or application of Sections 8.310 and 8.320. Their only effect is to provide that whatever duties or obligations the director of the Division of Planning and Construction had prior to January 15, 1973 (the effective date of Section 26.300), now have become the responsibility of the Commissioner of Administration.

The answer to your question, then, hinges on the issue of whether the provisions of Sections 8.310 and 8.320 irreconcilably conflict with any state constitutional or statutory provisions relating to the Department of Education, the state colleges, or the University of Missouri.

I

Addressing ourselves to this issue insofar as it relates to the Department of Education, we are led to the conclusion that the department is subject to the requirements of Sections 8.310 and 8.320. To begin with, it should be noted that Section 161.012, RSMo 1969, provides that the Department of Education shall include the State Board of Education, the Division of Public Schools, the Division of Registration and Examination, and the agencies assigned to the department.

Honorable Christopher S. Bond

As we understand it, your question, insofar as it deals with the Department of Education, has specific reference to the Missouri School for the Blind at St. Louis and the Missouri School for the Deaf at Fulton, which are governed by the State Board of Education, pursuant to Section 178.010, RSMo 1969, and the state training centers for mentally retarded children established by the State Board of Education pursuant to Section 178.200, RSMo 1969. Section 178.050, RSMo 1969, provides that the State Board of Education shall have care and control of all property owned by the state schools for the blind and the deaf. Section 178.210, RSMo 1969, grants similar powers to the State Board of Education with respect to the training centers for mentally retarded children. However, there is nothing in those sections which even remotely suggests that the State Board of Education, in controlling such property, is exempt from the requirements of Sections 8.310 and 8.320.

Nor does the language of the constitutional provisions dealing with the State Board of Education require such a conclusion. Article IX, Section 2(a) of Missouri's Constitution directs that:

"The supervision of instruction in the public schools shall be vested in a state board of education, . . ."

To our knowledge there has never been a suggestion that this phrase in any way places the Board outside the scope of the General Assembly's power to legislate. Article IX, Section 2(b), dealing with the qualification and duties of the Commissioner of Education, specifically provides that the Board shall have ". . . such other powers and duties as may be prescribed by law." (Emphasis added). There could be no clearer indication that the framers of the Constitution intended for the legislature to operate in this sphere.

To hold that the Department of Education is subject to the provisions of Sections 8.310 and 8.320 is not completely determinative of the question before us. Your question is whether the Department of Education must obtain the approval of the Commissioner of Administration before

- (1) Obtaining architectural documents;
- (2) Letting contracts for repair, rehabilitation, or new construction of facilities;
- (3) Supervising construction; and
- (4) Performing inspection and maintenance of facilities.

Honorable Christopher S. Bond

A close reading of Section 8.310 discloses that formal approval of the commissioner is required only as to the second enumerated function. Although Section 8.310 requires that the Commissioner of Administration serve as "advisor and consultant" to department heads in obtaining architectural plans, supervising construction, and inspection and maintenance, it does not require him to formally approve these functions.

Thus, we are of the opinion that formal approval by the Commissioner is not required for the performance of these particular functions. However, in performing such activities, the Department of Education must comply with any reasonable conditions or procedures that have been codified by the commissioner with respect to these activities pursuant to his rule-making authority under Section 8.320.

This holding is consistent with previous opinions of this office concerning the same subject. For example, in Opinion No. 25, we held that the Department of Conservation was subject to the provisions of Sections 8.310 and 8.320. Likewise, in Opinion Letters No. 26 and 27 issued to you on March 19, 1974, we ruled that the Division of Employment Security and the Missouri State Park Board, respectively, also were subject to the requirements of these sections.

It should be noted that the Department of Education will be abolished effective July 1, 1974, in accordance with the provisions of Section 5(2) of the Omnibus State Reorganization Act of 1974 (C.C.S.H.C.S.S.C.S.S.B. No. 1, 77th General Assembly, First Extraordinary Session). However, the operation and control of the aforementioned state institutions, which are to be transferred to the newly created Department of Elementary and Secondary Education, will remain vested in the State Board of Education. Section 5(1) of the Omnibus State Reorganization Act of 1974 provides that the Department of Elementary and Secondary Education shall be headed by the State Board of Education. It should be emphasized that such transfer will in no way alter or limit the operative effects of Sections 8.310 and 8.320 on the State Board of Education, with respect to the state schools for the blind and deaf and the state training centers for the mentally retarded.

II

The second half of your question seeks to determine the applicability of Sections 8.310 and 8.320 with respect to the state universities including the University of Missouri. Section 8.310, of course, contains a specific reference to these institutions. The pertinent part of that section provides:

Honorable Christopher S. Bond

". . . except that after the need for the construction, repair, maintenance or improvement of any building or facility serving a state institution of higher learning has been determined and the proposed construction or improvement has been approved as a part of the state's building program by the division of planning and construction and has been authorized by the general assembly and the governor through a proper appropriation, the boards of curators of the state university and Lincoln University and the several boards of regents of the state colleges may contract for architectural and engineering services for the design and supervision of the construction, repair, maintenance or improvement of educational buildings or institutions and may contract for construction, repair, maintenance or improvement."

We note that the above-quoted part of Section 8.310 contains reference to a determination of need for the proposed construction, repair, maintenance, or improvement of a particular building or facility. It does not, however, indicate who is to make this determination. The section also contains a requirement that the proposed construction or improvement be "approved" as a part of the State's building program by the Division of Planning and Construction, but does not state what this approval is to consist of. The words "approved" or "approval" when used in a statute requiring that a certain act meet with some designated approval, often may merely contemplate the doing of a purely ministerial act. Baynes v. Bank of Caruthersville, 118 S.W.2d 1051 (Spr.Ct.App. 1938).

However, we believe that a determination of such questions is unnecessary, in view of the requirement of Section 8.310 that a proper appropriation exist in order for the exception to operate. The existence of a specific appropriation will necessarily mean that the other two preconditions, i.e., determination of need and approval as part of the State's building program, will already have been met. Obviously, the legislature's decision in this regard will be conclusive. Therefore, the latter part of Section 8.310 must be interpreted to mean that once the legislature has given its approval by appropriating the necessary funds for the specific project, further approval by the Commissioner of Administration is not required.

Thus, we are of the opinion that the state universities, including the University of Missouri, may obtain architectural doc-

Honorable Christopher S. Bond

uments, let contracts for repair, rehabilitation, or new construction of facilities, supervise construction, and perform inspection and maintenance of facilities without the approval of the Commissioner of Administration once the necessary funds have been appropriated by the legislature for such purposes.

It is also our opinion, however, that the exception granted to the state colleges and universities by the latter part of Section 8.310 does not exempt these institutions from the requirements of Section 8.320, which authorizes the Commissioner of Administration to set forth reasonable conditions to be met and procedures to be followed in the repair, maintenance, operation, construction, and administration of state facilities.

We are aware, of course, that Article IX, Section 9(a) of the Constitution of Missouri, which deals with the University of Missouri, provides that "The government of the State University shall be vested in a board of curators" Similar powers are granted by statute to the boards of regents of the other state universities, or, as in the case of Lincoln University, to its board of curators. See Section 174.120, RSMo 1969; Section 175.040, RSMo 1969.

However, it is our view that Section 8.320 does not in any way conflict with Article IX, Section 9(a) or either of the aforementioned statutes. It does not inhibit or interfere with the power of the governing bodies to control or manage the operation of their respective universities. Rather, Section 8.320 only authorizes the promulgation of reasonable rules relating to the exercise of such control. We reject any suggestions that Article IX, Section 9(a) somehow immunizes the University of Missouri from the operation of Section 8.320; it has long been established that the General Assembly has the power to enact legislation regulating the exercise of a constitutional right. State ex rel. Randolph County v. Walden, 206 S.W.2d 979 (Mo. Banc 1947).

CONCLUSION

It is our opinion that the Department of Education must obtain formal approval of the Commissioner of Administration before letting contracts for repair, rehabilitation, or construction of facilities. It need not obtain formal approval before obtaining architectural documents, supervising construction, or performing inspection and maintenance, provided its procedures in carrying out these activities conform to the procedures the Commissioner of Administration has outlined pursuant to his rule-making authority under Section 8.320.

Honorable Christopher S. Bond

It is also our opinion that the state universities, including the University of Missouri, have the power and authority to obtain architectural documents, let contracts for repair, rehabilitation or new construction of facilities, supervise construction, and perform inspection and maintenance of facilities without the approval of the Commissioner of Administration, once the necessary funds have been appropriated by the legislature for the performance of such activities. These institutions, however, are subject to the provisions of Section 8.320.

The foregoing opinion, which I hereby approve, was prepared by my assistant Philip M. Koppe.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

SCHOOLS:
TEACHERS:
COMPENSATION:

A school district may use school tax money to pay the membership fees and dues in service organizations for school administrators

and teachers as part of their compensation. However, the payments may not begin during the term of an employment contract already in effect, but only at the beginning of a new contractual term.

OPINION NO. 30

January 21, 1974

Honorable Edward Stone, Jr.
Missouri Senate, 26th District
Room 419A, Capitol Building
Jefferson City, Missouri 65101



Dear Senator Stone:

This official opinion is in response to your request for a ruling on the following question:

"May school tax money be used to pay for the membership fees and dues of school administrators and the teachers who join service organizations such as Rotary, Lions, Optimists, B&PW, etc.?"

This request is prompted by the fact that a school district in the territory you represent has voted to pay a maximum of \$100 of membership dues for each school administrator joining local service clubs.

We do not believe that these expenditures can be justified as being for school purposes. The Missouri Constitution, Article IX, Section 5, states that public school money may be used "for establishing and maintaining free public schools, and for no other purpose whatsoever." The payment of membership fees in service organizations on behalf of school administrators or teachers could have, at most, a very tangential benefit to the school system; perhaps it would slightly improve school-community relations. However, the spending on balance does not seem to comply with the constitutional mandate. Compare Special District v. Wheeler, 408 S.W.2d 60, 63 (Mo. Banc 1966) (Article IX, Section 5, prohibits state aid to parochial schools); and Opinion 93, Cox, September 9, 1969 (school board may not use district funds to purchase liability insurance for the board's negligence); with Opinion 27, Dill, February 14, 1972 (school district may pay for publicity in support of a bond issue).

Honorable Edward Stone, Jr.

The other possible justification for the expenditure is as partial compensation for the school administrators or teachers involved. This office has ruled several times that a school district may compensate its employees in ways other than by direct paychecks, and we have approved, as compensation, school district purchase of liability insurance for school bus drivers (Opinion 67, Mallory, June 8, 1972), and purchase of health and life insurance for school employees (Opinion 305, Noren, June 17, 1971, and Opinion 500, Vanlandingham, November 18, 1969). Similarly, the General Assembly has enacted Section 105.710, House Bill 500, 77th General Assembly, First Regular Session (1973), which gives certain officials the benefits of the Tort Defense Fund as part of their compensation.

Under these principles, we believe that compensation may take the form of dues to service organizations. If, as part of the employment contract, the district and the school employee agree that the district shall pay the dues or membership fees of the employee in a local service organization, then the expenditure would be proper, assuming, of course, that the contract is proper in all other respects.

It should be noted that a district may not increase the compensation of any employee during the term of the employee's contract. Opinion 211, Belt, May 6, 1970; Opinion 171, Gralike, May 4, 1971; and Opinion 157, Kenton, October 2, 1973. Therefore if a person is hired on a multi-year contract, the school district may not begin paying that person's dues during the term of his contract, but must wait until a new contract is negotiated upon the expiration of the contract now in force.

CONCLUSION

It is, therefore, the opinion of this office that a school district may use school tax money to pay the membership fees and dues in service organizations for school administrators and teachers as part of their compensation. However, the payments may not begin during the term of an employment contract already in effect, but only at the beginning of a new contractual term.

This official opinion, which I hereby approve, was prepared by my assistant, Richard E. Vodra.

Very truly yours,



JOHN C. DANFORTH
Attorney General

Honorable Edward Stone, Jr.

Enclosures: Op. No. 211
5-6-70, Belt

Op. No. 171
5-4-71, Gralike

Op. No. 157
10-2-73, Kenton

Op. No. 93
9-9-69, Cason

Op. Ltr. No. 27
2-14-72, Dill

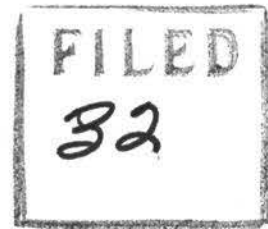
RETIREMENT:
COUNTY HEALTH CENTERS:
STATE EMPLOYEES' RETIREMENT SYSTEM:

Employees of county health centers established under the provisions of Chapter 205, RSMo, are not eligible for membership in the Missouri State Employees' Retirement System.

OPINION NO. 32

December 18, 1974

Honorable R. L. "Scoop" Usher
Representative, District 12
% House Post Office
State Capitol Building
Jefferson City, Missouri 65101



Dear Representative Usher:

This is to acknowledge receipt of your request for a formal opinion from this office which reads as follows:

"Are employees of County Health Centers established under Chapter 205; State employees under Section 104.310 R.S.Mo 1969, and thus covered by the Missouri State Employees Retirement System?"

In connection with the above, in the case of Hawkins v. Missouri State Employees' Retirement System, 487 S.W.2d 580 (Mo.Ct. App. at K.C. 1972), the issue was whether or not a circuit court reporter was entitled to membership and prior membership credit in the Retirement System. In this regard, Section 485.060, RSMo 1969, provides that a court reporter shall receive an annual salary of twelve thousand dollars and Section 485.065, RSMo 1969, provides that that salary six thousand five hundred dollars is to be paid out of the state treasury. In reaching its decision, the court determined whether or not an individual court reporter came within the definitions of "employee" and "department" as those terms are defined in subsections (11) and (15) of Section 104.310, RSMo 1969.

"(11) 'Department', any department, institution, board, commission, officer, court or any agency of the state government receiving state appropriations including allocated funds from the federal government

Honorable R. L. "Scoop" Usher

and having power to certify payrolls authorizing payments of salary or wages against appropriations made by the federal government or the state legislature from any state fund, or against trusts or allocated funds held by the state treasurer;

* * *

"(15) 'Employee', any elective or appointive officer or employee of the state who is employed by a department and earns a salary or wage in a position normally requiring the actual performance by him of duties during not less than one thousand five hundred hours per year, including each member of the general assembly, but not including any employee who is covered under some other retirement or benefit fund to which the state is a contributor; except this definition shall not exclude any employee as defined herein who is covered only under the Federal Old Age and Survivors' Insurance Act, as amended. As used in sections 104.310 to 104.550, the term 'employee' shall include civilian employees of the Army National Guard or Air National Guard of this state who are employed pursuant to section 709 of title 32 of the United States Code and paid from federal appropriated funds;"

The Kansas City Court of Appeals concluded that a court reporter was entitled to membership and prior membership credit in the Missouri State Employees' Retirement System. The reasoning of the court was that a court reporter was an "employee" of the state as defined in subsection (15) of Section 104.310, RSMo 1969, and was employed by a "department" which receives state appropriations as defined in subsection (11) of Section 104.310, RSMo 1969.

In regard to employees of county health centers, Section 205.010, RSMo 1969, provides that any county, subject to the provisions of the Missouri Constitution, may, under certain conditions, establish, maintain, manage, and operate a public health center. Section 205.100, RSMo 1969, indicates that the county court shall appoint the director of the public health center as county health officer and such county health officer shall exercise all of the rights and perform all of the duties pertaining to that office as

Honorable R. L. "Scoop" Usher

set forth under the health laws of the state and rules and regulations of the Division of Health. In addition, Section 205.110, RSMo 1969, reads as follows:

"The qualifications of all persons employed in the operation of said health center shall be at least equal to the minimum standard of qualifications as set forward by the division of health or its successors for positions of like importance and responsibilities."

In regard to the payment of salaries of employees of county health centers, we have been informed by the deputy director of the Division of Health as follows:

"You are correct in that the employees are paid by the various counties and cities and in turn are reimbursed by the Division of Health on a formula ranging from 6.6% to 77% of personal services. The formula is based upon an inverse ratio of the assessed valuation of the counties. Section 205.042, Subsection 10, provides that counties can contract with state agencies and basically this refers to the State Division of Health.

"The appropriation under which we reimburse counties is set forth in House Bill No. 1006, for the period beginning July 1, 1974 and ending June 30, 1975. Section 6.060, of the above bill states, 'To the Department of Social Services for the Division of Health for financial assistance to local health agencies including cities, counties, and regions for personal service expenditures in the operation of local agencies, from General Revenue..... \$1,392,000.'

"In addition to the above General Revenue funds, we expend approximately \$700,000 of Federal Funds for the same purpose."

As a result of the above, it is our view that the situation of employees of county health centers is essentially different from that of court reporters. The reason being that such employees are in fact employed by the various counties, performing services for the counties and are paid by the various counties and cities who in turn are only reimbursed by the Division of Health

Honorable R. L. "Scoop" Usher

on a formula ranging from 6.6% to 77% of personal services. We therefore conclude that employees of county health centers as provided for in Chapter 205, RSMo 1969, are not eligible for participation in the Missouri State Employees' Retirement System for the reason that they are not an "employee" of the state as defined in subsection (15) of Section 104.310, RSMo 1969, and are not employed by a "department" which receives state appropriations as defined in subsection (11) of Section 104.310, RSMo 1969.

CONCLUSION

It is the opinion of this office that employees of county health centers established under the provisions of Chapter 205, RSMo, are not eligible for membership in the Missouri State Employees' Retirement System.

The foregoing opinion, which I hereby approve, was prepared by my assistant, B. J. Jones.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

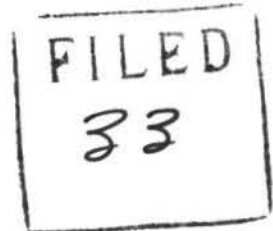
JOHN C. DANFORTH
Attorney General

LIBRARIES: Article VII, Section 13 of the Consti-
COMPENSATION: tution prevents the compensation of an
CITY TREASURER: elected city treasurer from being in-
CONSTITUTIONAL LAW: creased during the term of office of
such city treasurer, notwithstanding the
fact that Section 182.291, V.A.M.S., makes the city treasurer cus-
todian of the funds of a city-county library district. A city-
county library district has no authority to compensate the city
treasurer for serving as custodian of the library district's funds.

OPINION NO. 33

March 14, 1974

Honorable Fred Dyer
Representative, District 51
Room 103B, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Dyer:

This is in response to your request for an opinion to the
following question:

"May a City-County Library District merged
under the provisions of Section 182.291 pay
the City Treasurer additional compensation,
over and above that compensation paid him by
the City for the duties prescribed him under
Sections 4 and 7 of Section 182.291?"

We understand that your opinion request concerns the city of
St. Charles, a constitutional charter city, where the treasurer is
elected for a two year term.

Article VII, Section 13 of the Constitution provides:

"The compensation of state, county and munic-
ipal officers shall not be increased during
the term of office; nor shall the term of any
officer be extended."

That section applies to all officers who are elected or ap-
pointed for a definite term of office and, therefore, would apply
to a city whose treasurer is elected for a definite term. It has
been held that the constitutional prohibition of Article VII, Sec-
tion 13 does not preclude additional compensation when additional
duties are imposed upon the officeholder; State ex rel. McGrath v.
Walker, 10 S.W. 473 (Mo. 1889); Mooney v. County of St. Louis, 286

Honorable Fred Dyer

S.W.2d 763 (Mo. 1956). However, in making the city treasurer the treasurer for a city-county library district (Section 182.291, V.A.M.S.), the legislature did not provide for an increase in the compensation of city treasurers, therefore, since the legislature has not provided for an increase in salaries for performance of the duties provided by that section, it would not be proper under Article VII, Section 13 for the city to increase the compensation of the city treasurer during the term he is serving. For future terms, the city may increase the compensation of the city treasurer provided it follows the procedure set forth in its charter.

From your request, it would appear that the city-county library district may contemplate compensating the treasurer for performing the duties placed on him under Section 182.291. Section 182.291.7(2) provides:

"The city treasurer shall be the custodian of all library funds, which shall be deposited by the city treasurer, in a depository selected and approved by the library board. The library funds shall be kept separate and apart from other moneys of the city and disbursed by the city treasurer only upon the proper authenticated warrants of the library board. Such funds shall be audited annually by the city in the same manner as other funds of the city are audited."

The legislature has not authorized the city-county library district to compensate a treasurer for performing this duty. Therefore, the library district has no authority to compensate the city treasurer for performing this duty during his present term or any future term.

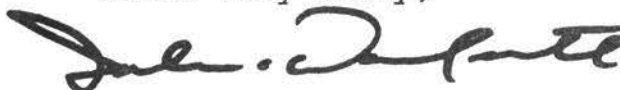
CONCLUSION

It is, therefore, the opinion of this office that Article VII, Section 13 of the Constitution prevents the compensation of an elected city treasurer from being increased during the term of office of such city treasurer, notwithstanding the fact that Section 182.291, V.A.M.S., makes the city treasurer custodian of the funds of a city-county library district. A city-county library district has no authority to compensate the city treasurer for serving as custodian of the library district's funds.

Honorable Fred Dyer

The foregoing opinion, which I hereby approve, was prepared by my assistant, Charles A. Blackmar.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

JOHN C. DANFORTH
Attorney General

May 20, 1974

OPINION LETTER NO. 35
Answer by letter-Klaffenbach



Honorable Maurice Schechter
State Senator, District 13
41 Country Fair Lane
Creve Coeur, Missouri 63141

Dear Senator Schechter:

This letter is in response to your question asking:

"Should the contributions made by the school districts to the teachers retirement system be charged to the 'incidental fund' or the 'teachers fund'?"

In our Opinion No. 78 dated May 31, 1946, to Scantlin, this office held that the employer's contribution to the public school retirement system is to be paid from the school district's incidental fund and not from the teachers' fund. You have that opinion and have questioned its present validity.

While some of the reasoning employed in that opinion may now be somewhat questionable, it remains our view that such employer contributions are to be charged to the incidental fund and not to the teachers' fund.

It is our view that there is a statutory duty placed upon school districts to contribute to the school teachers' retirement system and that this can be enforced by the retirement system itself because of such statutory obligation, Section 169.030(2), RSMo 1973 Supp., but that such employer contributions are not "teachers' wages" or "contracted obligations to teachers" within the meaning of Section 165.011, RSMo.

Honorable Maurice Schechter

We further note that the Scantlin opinion has been followed for almost thirty years during which time there have been no statutory changes which would require a different conclusion and that such administrative interpretations are deemed persuasive by the courts.

In view of the fact that the Supreme Court has held the requirements that such funds not be intermingled is mandatory and may not be violated by school board members, an authorization to charge such contributions against the teachers' fund should, in our view, come from the legislature.

Yours very truly,

JOHN C. DANFORTH
Attorney General



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

September 3, 1974

OPINION LETTER NO. 36

Mr. Edwin Pruitt, Jr., Chairman
Commission on Human Rights
314 East High Street
Jefferson City, Missouri 65101

Dear Mr. Pruitt:

This letter is in response to your request for an opinion on the constitutionality of Section 288.040(6), RSMo Supp. 1973.

We cite to you the recent United States Supreme Court decision in Geduldig v. Aiello, 414 U.S. 897, 94 S.Ct. 2485, 41 L.Ed. 2d 250 (1974). The court reversed a district court decision and upheld the constitutionality of a section of the California Disability Insurance System which parallels Section 288.040(6), RSMo Supp. 1973. That section reads:

"'Disability' or 'disabled' includes both mental or physical illness and mental or physical injury. An individual shall be deemed disabled in any day in which, because of mental or physical condition, he is unable to perform his regular or customary work. In no case shall the term 'disability' or 'disabled' include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter' (Emphasis added.)" West's Ann.Cal.Un.Ins. Code, §2626.

The court concluded that the exclusion of pregnancy disability from coverage does not amount to invidious discrimination under the Equal Protection Clause. The court remarked that the classification challenged relates to the asserted under-inclusiveness of the set of risks that the state has selected to insure. Although Missouri, like California, has created a program to insure most risks of employment disability, it has not chosen to insure all such risks.

Mr. Edwin Pruitt, Jr.

The United States Supreme Court has held that, consistent with the Equal Protection Clause, a state:

" . . . may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. . . . The legislature may select one phase of one field and apply a remedy there, neglecting the others. . . ." Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, at 489, 75 S.Ct. 461, 99 L.Ed. 563 (1955).

In Geduldig, supra, at 94 S.Ct. 2491, the court remarked:

" . . . Particularly with respect to social welfare programs, so long as the line drawn by the State is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point. '[T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all.' Dandridge v. Williams, 397 U.S. 471, 486-487 (1970).

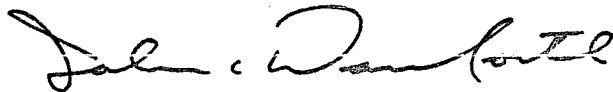
* * *

"It is evident that a totally comprehensive program would be substantially more costly than the present program and would inevitably require state subsidy, a higher rate of employee contribution, a lower scale of benefits for those suffering insured disabilities, or some combination of these measures. There is nothing in the Constitution, however, that requires the State to subordinate or compromise its legitimate interests solely to create a more comprehensive social insurance program than it already has."

We concur with the opinion of the court.

Therefore, applying the reasoning of Geduldig v. Aiello, supra, to the statute in point, it is our view that there is no constitutional infirmity in Section 288.040(6), RSMo Supp. 1973.

Yours very truly,



JOHN C. DANFORTH
Attorney General

ELECTIONS:
CITY ELECTIONS:
CITIES, TOWNS & VILLAGES:

A third class city located in a county which does not have a board of election commissioners may designate the number of election precincts within the boundaries of the municipality.

OPINION NO. 37

February 25, 1974

Honorable Clifford W. Gannon
Representative, District 125
Room 405, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Gannon:

In your recent opinion request you stated the following:

"The City of DeSoto is a city of the third class with a city manager form of government and is in Jefferson County, a second class county. Both Jefferson County and the City of DeSoto have adopted Chapter 114 R.S.Mo., local option county registration.

"Does the DeSoto City council have the sole authority and power pursuant to and in accordance with the provisions of Section 78.540, sub-paragraph 6, to designate and change the number of voting precincts within the City under the following circumstances:

- (1) When there are state, county, city and six director school district elections on the same date?
- (2) When there are county, city, and six director school district elections on the same date?
- (3) When there are city and six director school district elections on the same date?
- (4) When there are only city elections on the date of election?"

The 77th General Assembly in enacting House Bill Nos. 20, 71, 94, and 97 that repealed Chapters 114 and 116, RSMo, provided a clear answer to your question. Section 20 of that act (Section 114.116, RSMo Supp. 1973) in subparagraph 1 states:

Honorable Clifford W. Gannon

"Election districts or precincts for that part of the county outside the corporate limits of any city, town or village, which for municipal election purposes is subject to the provisions of this act, shall be set by the county court. The election precincts for that part of the county within any city, town or village, which for municipal election purposes is subject to the provisions of this act, shall be set by the governing body of the city, town or village or by the municipal election authority, whichever the case may be."

This section grants the municipality the power to designate voting precincts within the municipality for any election providing that any specific provisions governing the number or location of precincts are followed. A careful reading of the above-quoted provision indicates that it is applicable not only to municipal election, but all elections. The reference to municipal elections is included only to define the class of cities subject to this new act. The provisions of this act are applicable to DeSoto, as Section 1 of the act states that the act ". . . shall apply in all elections except those in cities and counties having a board of election commissioners."

CONCLUSION

It is the opinion of this office that a third class city located in a county which does not have a board of election commissioners may designate the number of election precincts within the boundaries of the municipality.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Peter H. Ruger.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

TAXATION (SALES & USE): Only certain activities of sawmills and stave mills constitute manufacturing. The cutting of logs into various lengths and widths, the subsequent air or kiln drying of this lumber, and the planing of lumber for boards, without further finishing for specific product adaptations, do not constitute manufacturing. Other commercially useful by-products of this process, such as chips and sawdust are not manufactured articles. The foregoing activities are processing and are not encompassed by the sales tax exemptions of Section 144.030.3(3) and (4), RSMo 1969, that exempt from the imposition of sales or use tax machinery and equipment replacing equipment used directly for manufacturing or fabricating a product, or machinery and equipment purchased for direct use in manufacturing, mining or fabricating a product. In cases in which a substantial transformation of the original raw material occurs, such as the milling of bolts to produce barrel and heading staves, manufacturing occurs. The machinery used in such an operation is exempt from sales tax, pursuant to Section 144.030.3(3) and (4), RSMo 1969, if it is used directly in manufacturing a product which is intended to be sold ultimately for final use or consumption.

OPINION NO. 38

January 23, 1974

Honorable James R. Strong
Representative, District 119
Room 101E, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Strong:

You asked the following question of this office:

"Are sawmills and stave mills performing the operations enumerated in paragraph 4 hereof engaged in 'manufacturing or fabricating a product which is intended to be sold ultimately for final use or consumption' within the meaning of Section 144.030 R.S.Mo., 1969, paragraph 3, subparagraph 3 or 4?"

Paragraph 4 of your opinion request describes the sawmill and stave mill operations, as follows: Logs are received fresh from the woods. These logs are cut into lengths, the limbs are removed, and then channeled into the stave mill or sawmill to be sawed. At the initial process, stave and heading bolts, already cut and split are received. Logs for the sawmill are taken to the mill, the bark

Honorable James R. Strong

removed, and are cut into lumber of random widths, lengths, and dimension thickness. The lumber is then graded as to the quality of the board and forwarded to concrete pads to be air dried. After the lumber is air dried, it is shipped to customers unless the customer specifies that it is to be planed or kiln dried.

You note that dry kilned or planed lumber has more value than green air dried lumber. You further state that lumber is then shipped to furniture factories or wholesale lumber brokers to be further processed and sold to an ultimate consumer. During all of this sawing and milling, slabs are accumulated which are converted into chips and sold to box board companies. Bark is accumulated which is sold to nursery companies for mulch or for resale. Sawdust is also accumulated and sold to briquette manufacturers. Stave and heading logs and stave and heading bolts are milled through the stave mill and the end products are barrel and heading staves which are sold to distilleries.

Section 144.030, RSMo 1969, referred to in your question, provides:

"3. There are also specifically exempted from the provisions of sections 144.010 to 144.510 and 144.600 to 144.745 and from the computation of the tax levied, assessed or payable under sections 144.010 to 144.510 and 144.600 to 144.745:

* * *

(3) Machinery and equipment, replacing and used for the same purposes as the machinery and equipment replaced by reason of design or product changes, which is purchased for and used directly for manufacturing or fabricating a product which is intended to be sold ultimately for final use or consumption;

(4) Machinery and equipment purchased and used to establish new or to expand existing manufacturing, mining or fabricating plants in the state if such machinery is used directly in manufacturing, mining or fabricating a product which is intended to be sold ultimately for final use or consumption;"

Your question is, in short, whether the machinery and equipment used in sawmills and stave mills performing the previously described operations is exempt from the Missouri sales/use tax law

Honorable James R. Strong

because it is used in manufacturing or fabricating a product to be sold ultimately at retail.

In Opinion No. 165 issued November 21, 1972, to Henry Maddox, we dealt with a similar question involving the activities of meat packing plants. A copy of that opinion is attached for your reference. Many of the considerations expressed in that opinion are applicable to the question presented herein.

In responding to your question, we must characterize the operations described as either processing or manufacturing. It is clear that the legislature of Missouri intended to distinguish between processing and manufacturing as an examination of the exemption provisions of the sales and use tax law reveals that these terms are not used interchangeably. Much of what is now Section 144.030, subsection 3, was enacted in 1961. See Laws of Missouri 1961, page 623. Subparagraphs (1) and (5) of this same enactment grant an exemption for materials used in manufacturing, processing, compounding, mining, producing or fabricating (subparagraph (1)) "or manufacturing, processing, modification or assembly" (subparagraph (5)). The insertion of the term "processing" in these two subparagraphs and its exclusion from subparagraphs (3) and (4) and certain other subparagraphs indicates clearly that the legislature intended a different meaning be assigned to each term. As we noted in our prior opinion, to distinguish manufacturing from processing, "a substantial transformation of the original raw material" must occur. A mere rearrangement of the raw materials and not a significant change in form, quality and adaptability, would prevent an operation from being characterized as manufacturing. Thus the exemptions provided by subsections 3 and 4 would not be applicable to machinery used in such processing.

No reported Missouri decision offers significant guidance on the questions presented by your opinion request. The annotation in 17 A.L.R.3d 7, Section 24, indicates a division among other jurisdictions as to whether this activity is manufacturing. Many of the decisions from other jurisdictions are of little value in analyzing your question because their decisions on whether the activities of sawmills constituted manufacturing involve the characterization of such activity as either manufacturing or the activities of a merchant. In cases where a sales or use tax was involved, the laws of the states involved did not present the Missouri dichotomy between the use of the term processing and manufacturing.

It is our opinion that, of the operations described in your factual summary, the only one that can be characterized as manufacturing is the milling of bolts into staves for barrel manufacture. Only in this operation does more than a slight transformation of the original raw material occur. The other operations

Honorable James R. Strong

are almost identical in effect to the cutting of meat carcasses that was held to be processing in Opinion No. 165. Thus the mere cutting of logs, removal of bark, air and kiln drying, planing, conversion of slabs into chips, debarking, and accumulation of sawdust constitute processing and the machinery used for these processes is not exempt from the imposition of the Missouri sales or use tax law.

A number of decisions from other states support the conclusion stated herein. In Commonwealth v. Babcock Lumber Company, 272 A.2d 522 (Pa.Comm. 1971), the court ruled that the taxpayer's activity of kiln drying green lumber did not qualify for a manufacturing exemption. The court viewed such drying as only a superficial change, stating ". . . After kiln drying it [the lumber] is neither new nor different but essentially the same product at the end of the process as it was upon entering the process, namely pre-cut unfinished lumber." (at 525). The lack of sophistication in the production process of pulpwood compelled the Maine Supreme Court in Dead River Co. v. Assessors of Houlton, 103 A.2d 123 (Me. 1953) to conclude that pulpwood was not manufactured timber in any sense. The process for the preparation of pulpwood described in the Dead River case, consisting of the cutting of wood logs into four foot lengths, is not substantially different from most of the processes described herein. It was observed in Ingram v. Cowles, 23 N.E. 48 (Mass. 1889), as follows:

" . . . we hesitate to say that sawing logs into boards is a 'branch of manufacture,' and think it doubtful whether something more of a transformation of the raw material is not necessary to bring the employment within the clause. . . ." (at 49)

An operation in which lumber was cut, transported to a saw-mill, cut into boards of varying lengths, stored, dried, and sold to furniture manufacturers was characterized as a process rather than manufacturing in the decision styled Commonwealth v. Hardes Lumber Corp., 27 Pa. D. & C.2d 657 (Dauphin Co. 1961). In that decision, the court observed:

"In the last analysis, defendant in its saw-mill operation reduces the logs to lumber, that is it cuts boards of varying sizes from the logs, dries them and sells them to furniture manufacturers. Nothing is added to make the wood any different in its composition. It is the same product in all respects, except that it is cut into smaller sizes and dried. . . ." (at 662)

Honorable James R. Strong

"In none of the defendant's operations was there actually involved such a change as to cause a new product to emerge. When this lumber is sold, it is the same wood in all respects as when it was cut, except for the drying process. . . ." (at 664)

In reaching its decision, this Pennsylvania court relied on the Armour & Co. v. City of Pittsburgh decision, 69 A.2d 405 (Pa. 1949). The Armour decision was one of the many decisions supporting our conclusion in our prior meat packing opinion.

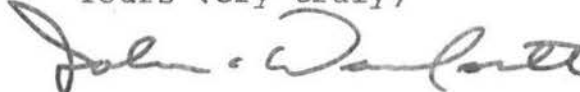
CONCLUSION

It is the opinion of this office that only certain activities of sawmills and stave mills constitute manufacturing. The cutting of logs into various lengths and widths, the subsequent air or kiln drying of this lumber, and the planing of lumber for boards, without further finishing for specific product adaptations, do not constitute manufacturing. Other commercially useful by-products of this process, such as chips and sawdust are not manufactured articles. The foregoing activities are processing and are not encompassed by the sales tax exemptions of Section 144.030.3(3) and (4), RSMo 1969, that exempt from the imposition of sales or use tax machinery and equipment replacing equipment used directly for manufacturing or fabricating a product, or machinery and equipment purchased for direct use in manufacturing, mining or fabricating a product.

In cases in which a substantial transformation of the original raw material occurs, such as the milling of bolts to produce barrel and heading staves, manufacturing occurs. The machinery used in such an operation is exempt from sales tax, pursuant to Section 144.030.3(3) and (4), RSMo 1969, if it is used directly in manufacturing a product which is intended to be sold ultimately for final use or consumption.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mark D. Mittleman.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 165
11-21-72, Maddox

January 22, 1974

OPINION LETTER NO. 40
Answer by letter-Klaffenbach

Honorable Ike Skelton
State Senator, District 28
Room 421, Capitol Building
Jefferson City, Missouri 65101



Dear Senator Skelton:

This letter is in response to your question asking:

"May a Missouri corporation [or a non-Missouri corporation], whose primary purpose is originating and making loans, make and close a loan in another state, requiring all payments on this loan to be made in the other state, and validly hold and enforce a loan represented by a deed of trust on real estate located in Missouri upon default by the borrowers for the principal balance due on the loan plus all interest accrued on such loan at a rate of interest in excess of the Missouri 8% statutory limit, which would be stated in the note."

In answering either of your questions, there are a multitude of facts which would have to be determined which are not presented.

The generally accepted rules governing such conflict situations are found in Usury-Effectiveness of the General Usury Statutes of Missouri, 26 Mo.L.Rev. 217, 235 (1961), footnoted material in brackets:

"G. Conflict of Laws Problem

Where there is a possibility of conflict between Missouri laws and the laws of another state which allow a higher interest rate, Missouri courts generally apply the rule that, in

Honorable Ike Skelton

the absence of any subterfuge to evade the stricter Missouri laws, the intention of the parties governs as to which laws should apply [Davis v. Tandy, 107 Mo. App. 437, 81 S.W. 457 (K.C. Ct. App. 1904).], and parol evidence is admissible to show such intention [Hansen v. Duvall, 333 Mo. 59, 62 S.W.2d 732 (1933).]. In the absence of evidence of the intention, the laws of the place of performance of the loan contract prevail [Central Nat'l Bank v. Cooper, 85 Mo. App. 383 (K.C. Ct. App. 1900). But the court indicated that if performance is placed in a state which has no connection with the contract merely as a device to evade Missouri's usury laws, such a device would fail. But see Cowgill v. Jones, 99 Mo. App. 390, 73 S.W. 995 (K.C. Ct. App. 1903), which indicated that the law of the place of execution would govern.]. Performance is said to be the repayment of the loan [Central Nat'l Bank v. Cooper, supra note 138.]. But Missouri's avowed public policy against usurious contracts is not so strong that Missouri courts will refuse to enforce a contract which would be unenforceable under Missouri law because of usury if such contract is legal under the laws of the other state [Davis v. Tandy, supra]. Therefore, the above rules are sometimes disregarded or modified in order to prevent a loan from being usurious. In Davis v. Tandy, there was no stipulation as to the intention of the parties and the loan was to be repaid in Missouri. The court indicated that since the interest was usurious under Missouri law, it would be presumed the parties intended the governing law to be that of the state of execution of the contract, in which the interest rate charged was legal [But see J. I. Case Threshing Mach. Co. v. Tomlin, supra note 116, which indicates a statement of place of performance is evidence that the parties intended the law of that place to govern.]. In Hansen v. Duvall, the plaintiff in purchasing property assumed his predecessor-in-title's notes, but later gave defendant-holder his own notes. The court disregarded the facts that the later notes were both executed and payable in Missouri and that both plaintiff and defendant were residents of Missouri, and based its

Honorable Ike Skelton

decision on the fact that since plaintiff's predecessor's notes were payable in Kansas plaintiff's notes assumed the same governing law--that of Kansas."

The question of whether usury affects the validity of a deed of trust of realty has been answered by the Missouri Supreme Court in Gehlert v. Smiley, 114 S.W.2d 1029, 1034 (Mo. 1937):

" . . . When we look to our own statutes, we find that, except as to mortgages and pledges of personal property, usury invalidates only the part of an agreement which provides for illegal interest. Ferguson v. Soden, 111 Mo. 208, 19 S.W. 727, 33 Am.St.Rep. 512; Bowman v. Strother, 144 Mo.App. 100, 128 S.W. 848. Section 2844, R.S.1929, Mo.St.Ann. § 2844, p. 4633, provides that receiving or exacting usurious interest on any indebtedness 'shall render any mortgage or pledge of personal property, or any lien whatsoever thereon given to secure such indebtedness, invalid and illegal.' Other statutes allow usury to be pleaded as a defense to prevent recovery of more than the actual debt with legal interest, section 2843, R.S.1929, Mo.St.Ann. § 2843, p. 4632; and permit recovery back by a borrower of usurious interest actually paid, with attorneys' fees and costs, section 2842, R.S. 1929, Mo.St.Ann. § 2842, p. 4630. We have no statute making real estate mortgages invalid because they exact usurious interest and the mortgage involved here was a real estate mortgage. Cavally v. Crutcher, Mo.App., 9 S.W.2d 848. Mortgagors of real estate therefore, have only the rights given by the other two statutes, namely, to claim credit on the principal debt for any usurious interest payments, to prevent foreclosure for failure to make payment of usury, to stop the sale by tender of the actual amount due, and to recover back anything paid in excess of the actual debt with legal interest. Section 4421, R.S. 1929, Mo. St.Ann. § 4421, p. 3042, in addition provides punishment as a criminal offense in certain cases."

Honorable Ike Skelton

The question of how the Missouri courts would apply the foregoing precedents in any given situation is a question upon which we cannot speculate in view of the myriad fact situations that may exist.

Yours very truly,

JOHN C. DANFORTH
Attorney General

USURY:
INTEREST:
RETAIL CREDIT ACT:

Transactions characterized by the following are governed by the Retail Credit Sales Act: (1) the seller is a retail seller; (2) the buyer is a retail buyer; (3) the subject matter of the transaction consists of goods or services having a cash sale price of less than \$7,500; and (4) payment therefor, whether lump sum or periodic, is deferred. If the transaction is effected pursuant to a retail charge agreement, no separate charge may be assessed by the merchant for the buyer's failure to pay the amount due within the time stated; in that event, the delinquent amount becomes part of the unpaid balance subject to the permissible statutory monthly time charge. If the transaction is effected under a retail time contract and if the contract so provides, the merchant can assess a separate charge for the buyer's default on an installment due within the permissible statutory limits. Finally, the Missouri usury law does not prohibit merchants from assessing a reasonable charge for handling dishonored checks tendered for payment of goods purchased, provided the purchaser has prior notice of the merchant's policy. If, however, the check was tendered as payment of an amount due under a retail charge agreement or retail time contract, the amount or rate of such charge would be governed by the Retail Credit Sales Act.

OPINION NO. 41

September 10, 1974

Honorable George J. Donegan
Representative, District 146
1714-18 East Meadowmere
Springfield, Missouri 65804



Dear Representative Donegan:

This is in response to your request for an opinion from this office regarding the assessment by merchants of a "finance" or "handling" charge in the following circumstances:

- "(1) A business delivers merchandise or provides services pursuant to a telephone order; during the same month a billing is forwarded to the purchaser bearing the following notation: ALL ACCOUNTS DUE AND PAYABLE THE 10TH OF THE MONTH FOLLOWING MONTH OF PURCHASE; A FINANCE CHARGE OF THREE (3%) PERCENT OF THE UNPAID BALANCE WILL BE CHARGED ON ALL ACCOUNTS NOT PAID WHEN DUE.

Honorable George J. Donegan

disclosure requirements and limits the time-price differential in certain credit sales.

77 C.J.S. Sales §235 describes a credit sale as follows:

"A transaction whereby property is sold without any expectation of immediate payment is a sale on credit, regardless of the length of time for which payment is deferred, whether one day or a fraction thereof, or a longer period, and whether or not the amount of credit is determined. . . ."

Similarly, Section 408.250(15), V.A.M.S., defines a retail time transaction as follows:

"'Retail time transaction' means a contract to sell or furnish or the sale of or furnishing of goods or services by a retail seller to a retail buyer for which payment is to be made in one or more deferred payments under and pursuant to a retail time contract or a retail charge agreement."

Accordingly, a retail time transaction occurs if payment for the goods or services is deferred, whether payment therefor will be made in a lump sum or in periodic installments. The applicability of the act, however, depends upon the position of the parties and the nature and value of the subject matter of the transaction. A retail time transaction involves a contract to sell or furnish, or the sale or furnishing of goods or services by a retail seller to a retail buyer.

A retail seller is defined in Section 408.250(13), V.A.M.S., as follows:

"'Retail seller' or 'seller' means a person who regularly sells or offers to sell goods or services to retail buyers. The term also includes a person who regularly grants credit to retail buyers for the purpose of purchasing goods or services from any person, pursuant to a retail charge agreement, but shall not apply to any licensee under Chapter 367, RSMo."

A retail buyer is defined in Section 408.250(11), V.A.M.S., as a ". . . person who buys goods or obtains services from a retail

Honorable George J. Donegan

seller in a retail time transaction." In other words, the act contemplates coverage of retail time transactions involving generally consumer sales.

Goods forming the subject matter of a transaction within the purview of the act are defined in Section 408.250(4), V.A.M.S., as follows:

"'Goods' means all tangible chattels personal having a cash sale price of seventy-five hundred dollars or less and merchandise certificates or coupons having a cash sale price of seventy-five hundred dollars or less issued by a retail seller exchangeable for tangible chattels personal of such seller, but the term does not include motor vehicles, nonprocessed farm products, livestock, money, things in action, or intangible personal property. The term includes tangible chattels personal which, at the time of the sale or subsequently, are to be so affixed to realty as to become a part thereof whether or not severable therefrom."

Services are defined in Section 408.250(16), V.A.M.S., as ". . . work, labor and services having a cash sale price of seventy-five hundred dollars or less furnished in the delivery, installation, servicing, repair or improvement of goods."

In light of the above definitions, it is the opinion of this office that the provisions of the Retail Credit Sales Act apply to all transactions characterized by the following: (1) the seller is a retail seller; (2) the buyer is a retail buyer; (3) the subject matter of the transaction consists of goods or services having a cash sale price of less than \$7,500; and (4) payment, whether lump sum or periodic, is deferred. When all these conditions are met, the transaction is a retail time transaction, whether entered into under a retail time contract or pursuant to a retail charge agreement.

This being the case, if in your hypothetical the goods or services have a cash sale price under \$7,500, and if the transaction is between a retail seller and a retail buyer, then the transaction would be governed by the Retail Credit Sales Act because payment for the goods or services is deferred.

If those conditions are met, it is next necessary to consider what, if any, charge may be assessed by the merchant for the failure of the buyer to pay an amount due within the time specified. The

Honorable George J. Donegan

answer to this question will depend upon whether the transaction was effected under a retail time contract or pursuant to a retail charge agreement.

A retail charge agreement is defined in Section 408.250(12), V.A.M.S., as follows:

"'Retail charge agreement' means an agreement entered into in this state between a retail seller and a retail buyer prescribing the terms of retail time transactions to be made from time to time pursuant to such agreement, and which provides for a time charge to be computed on the buyer's total unpaid balance from time to time."

In common parlance, such an agreement is a charge account entered into with a retail seller.

A retail time contract is defined in Section 408.250(14), V.A.M.S., as follows:

"'Retail time contract' means an agreement evidencing one or more retail time transactions entered into in this state pursuant to which a buyer engages to pay in one or more deferred payments the time sale price of goods or services. The term includes a chattel mortgage; conditional sales contract; and a contract for the bailment or leasing of goods by which the bailee or lessee contracts to pay as compensation for their use a sum substantially equivalent to or in excess of their cash sale price and by which it is agreed that the bailee or lessee is bound to become, or, for no further or a merely nominal consideration has the option of becoming, the owner of the goods upon full compliance with the provisions of the contract."

This definition contemplates one or more retail time transactions evidenced by one agreement and does not contemplate an agreement pursuant to which the buyer, on a continuing basis, would purchase goods or services from the seller.

The distinction between retail charge agreements and retail time contracts is of significance, for the remaining provisions of the act, dealing with disclosure requirements and restrictions

Honorable George J. Donegan

on time charges, vary according to the nature of the agreement under which a credit transaction is consummated. The disclosure requirements applicable to retail charge agreements are enumerated in Section 408.290. By way of contrast, the disclosure requirements applicable to retail time contracts are enumerated in Section 408.260.

Under a retail charge agreement the time charge is defined in Section 408.250(17), V.A.M.S., as the amount in excess of the cash sale price. The maximum rate at which a time charge under a retail charge agreement may be assessed is limited under Section 408.300 (2) as follows:

"2. Notwithstanding the provisions of any other law the seller and assignee under a retail charge agreement may charge, receive and collect a time charge which shall not exceed the following:

(1) On so much of the unpaid balance as does not exceed five hundred dollars, fifteen cents per ten dollars per month;

(2) If the unpaid balance exceeds five hundred dollars, seven and one-half cents per ten dollars per month on that portion over five hundred.

The time charge under this subsection shall be computed from month to month (which need not be a calendar month) or other regular period, on all amounts unpaid under the agreement at the beginning of each such period. The time charge under this subsection may be computed for all unpaid balances within a range of not in excess of ten dollars on the basis of the median amount within such range, if as so computed such time charge is applied to all unpaid balances within such range. A minimum time charge not in excess of seventy cents per month may be charged, received and collected."

Under a retail time contract the time charge is defined in Section 408.250(17), V.A.M.S., as the amount in excess of the principal balance, which is computed in accordance with subsection 5(6) of Section 408.260. The maximum rate at which a time charge may be assessed under a retail time contract is limited under Section 408.300 (1) as follows:

Honorable George J. Donegan

"1. Notwithstanding the provisions of any other law the seller or other holder under a retail time contract may charge, receive and collect a time charge, which shall be in lieu of any interest charges, except such as may arise under the terms of sections 408.250 to 408.370 after maturity of the time contract and which charge shall not exceed the following:

(1) On so much of the principal balance as does not exceed three hundred dollars, twelve dollars per one hundred dollars per year;

(2) On so much of the principal balance as exceeds three hundred dollars but is less than one thousand dollars, ten dollars per one hundred dollars per year on that portion over three hundred dollars;

(3) If the principal balance exceeds one thousand dollars, eight dollars per one hundred dollars per year on that portion over one thousand dollars.

The time charge under this subsection shall be computed on the principal balance of each transaction, as determined under subsection 5 of section 408.260, on contracts payable in successive monthly payments substantially equal in amount from the date of the contract to the maturity of the final payment, notwithstanding that the total time balance thereof is required to be paid in one or more deferred payments. When a retail time contract provides for payment other than in substantially equal successive monthly payments, the time charge shall not exceed the amount which will provide the same return as is permitted on substantially equal monthly payment contracts, having due regard for the schedule of payments. The time charge may be computed on the basis of a full month for any fractional portion of a month in excess of ten days. A minimum time charge of twelve dollars may be charged, received, and collected on each such contract."

Subsection 3 of Section 408.300 provides that the time charge includes all charges incidental to investigating and making any retail transaction. Further, it provides:

Honorable George J. Donegan

". . . No fee, expense, delinquency charge, collection charge, or other charge whatsoever, shall be charged, received, or collected except as provided in sections 408.250 to 408.370."

The act contains only two references to delinquency or collection charges: (a) Section 408.290(1) requires disclosure to the buyer under a retail charge agreement that attorney's fees may be payable upon default if the account is referred to an attorney for collection; and (b) Section 408.330 provides as follows:

"If a retail time contract so provides, the holder thereof may charge and collect: (1) A delinquency and collection charge on each installment in default for a period of not less than ten days in an amount not to exceed five percent of each installment or five dollars, whichever is less; provided, however, that a minimum charge of one dollar may be made; or (2) interest on each delinquent payment thereunder at a rate which shall not exceed the highest lawful contract rate. In addition to such delinquency charge, the contract may provide for the payment of attorney fees not exceeding fifteen percent of the amount due and payable under such contract where such contract is referred for collection to an attorney not a salaried employee of the holder of the contract and for court costs."

In view of the distinctions maintained throughout the act between retail charge agreements and retail time contracts, it is the opinion of this office that under a retail charge agreement, no charge may be assessed for failure of the buyer to pay an amount due under such agreement, except attorney's fees not exceeding fifteen percent of the total unpaid balance if the account is referred to an attorney for collection.

However, the seller under a retail charge agreement is not without recourse with respect to payments not made when due. Subsection 2 of Section 408.300 provides that under a retail charge agreement, the seller must furnish the buyer a statement reciting, among other items, the "total unpaid balance at the beginning and end of the period," together with the amount of the time charge, if any. Under a retail charge agreement the applicable time charge is computed on the basis of the unpaid balance, that is, on ". . . all amounts unpaid under the agreement at the beginning of each such period. . . ." (emphasis added) Section 408.300(2), RSMo 1969. Accordingly, should

Honorable George J. Donegan

the buyer under such agreement fail to pay the total amount due on the appropriate date, the amount by which he is delinquent becomes an unpaid balance subject to a time charge at the applicable rate.

By designating retail time contracts in Section 408.330 and by omitting therefrom any reference to retail charge agreements, the legislature in our opinion meant to exclude from the delinquency and collection provisions those transactions effected pursuant to retail charge agreements. This interpretation is supported by the distinctions maintained throughout the act between retail charge agreements and retail time contracts. Further, in preserving this distinction, the legislature provided not only different means of computing time charges, but also different rates.

Under a retail charge agreement the seller may assess a monthly rate of one and one-half percent on amounts up to five hundred dollars and three-fourths percent on amounts in excess thereof. Under a retail time contract the seller may assess only an annual rate of twelve percent on amounts up to three hundred dollars, ten percent on amounts in excess of three hundred dollars, and eight percent on amounts in excess of one thousand dollars. On the basis of the foregoing, it is the opinion of this office that the time rate provided for retail charge agreements constitutes the exclusive means by which the seller can be compensated for extending credit initially and for "penalizing" the buyer's delinquency.

When these conclusions are applied to the facts you describe, the assessment of a three percent "finance" charge would be unlawful if the retail time transaction was effected pursuant to a retail charge agreement. In that event, the amount unpaid would be subject only to the time charge as provided in Section 408.300(2). If, however, the transaction had been consummated by means of a retail time contract and if that contract so provided, the seller could assess a delinquency charge, not in excess of five percent or five dollars, whichever is less, on any installment in default past ten days under provisions of Section 408.330.

With respect to the second factual situation you describe, we can find no Missouri statute expressly prohibiting or expressly authorizing merchants to assess a charge for dishonored checks. Absent a specific statutory prohibition, there exist only two theories under which such a practice might be unlawful: (1) if it can be said that the merchant in effect has extended a "loan" to the purchaser whose check was dishonored and that the "handling charge" takes on the character of interest, then the amount or rate of said charge would be governed by the Missouri usury law; or (2) if the check was tendered as payment of an installment due under a retail time contract or as payment on the balance due under a retail charge agreement, then the proper delinquency and collection

Honorable George J. Donegan

charges would be limited in accordance with the Retail Credit Sales Act.

Considering the first alternative, we assume that the transaction is for cash, at least in the contemplation of the merchant who accepts the check as consideration for the groceries purchased. Although checks are deemed only conditional payment, 77 C.J.S. Sales §238, the acceptance of a check by a merchant does not raise a presumption that he has extended credit. Although upon dishonor, no payment, in effect, has been made and the amount due is still owing, the transaction even at that point cannot be characterized as a "loan" within the purview of the usury law. As previously noted, the Missouri usury law forbids ". . . the exaction or receipt of more than a specified legal rate for the hire of money and not of anything else; . . ." (emphasis added) General Motors Acceptance Corporation v. Weinrich, *supra*. The circumstances you describe ostensibly constitute a cash purchase of goods. Even though the check tendered therefor subsequently is dishonored, a sale of goods, as opposed to the hiring of money, has transpired. Accordingly, it is the opinion of this office that a bad check policy such as you describe is not subject to the Missouri usury law.

Even if we were to conclude that the merchant effectively extends a "loan" when the buyer's check is dishonored, a charge for handling a bad check would not constitute interest for the purposes of the usury law if the amount of the charge was reasonably related to the services performed in connection therewith. Opinion No. 506, Ottinger, December 18, 1969; Cuendet v. Love, Bryan and Company, 57 S.W.2d 701 (St.L.Ct.App. 1933); Hecker v. Putney, 196 S.W.2d 442 (St. L.Ct.App. 1946).

Alternatively, if the check were tendered as payment for an installment due under a retail time contract or as payment on a balance due under a retail charge agreement, the dishonored check would constitute no payment. Accordingly, the buyer would be in default on that installment or balance due, and the provisions of the Retail Credit Sales Act, relating to delinquency and collection charges, would govern the amount or rate of permissible charges, if any, and an arbitrary charge called a "handling charge" would be unlawful.

If the transaction does not fall within the scope of the Retail Credit Sales Act, it is the opinion of this office that a merchant may assess a reasonable charge for handling dishonored checks if prior notice or disclosure of such policy is available to the purchaser, leaving the purchaser free to choose whether to pay with a check or decline to make a purchase from the merchant.

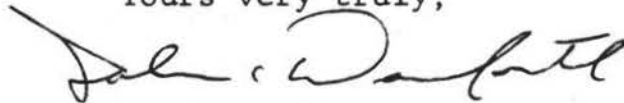
CONCLUSION

Honorable George J. Donegan

It is the opinion of this office that transactions characterized by the following are governed by the Retail Credit Sales Act: (1) the seller is a retail seller; (2) the buyer is a retail buyer; (3) the subject matter of the transaction consists of goods or services having a cash sale price of less than \$7,500; and (4) payment therefor, whether lump sum or periodic, is deferred. If the transaction is effected pursuant to a retail charge agreement, no separate charge may be assessed by the merchant for the buyer's failure to pay the amount due within the time stated; in that event, the delinquent amount becomes part of the unpaid balance subject to the permissible statutory monthly time charge. If the transaction is effected under a retail time contract and if the contract so provides, the merchant can assess a separate charge for the buyer's default on an installment due within the permissible statutory limits. Finally, the Missouri usury law does not prohibit merchants from assessing a reasonable charge for handling dishonored checks tendered for payment of goods purchased, provided the purchaser has prior notice of the merchant's policy. If, however, the check was tendered as payment of an amount due under a retail charge agreement or retail time contract, the amount or rate of such charge would be governed by the Retail Credit Sales Act.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Karen M. Iverson.

Yours very truly,



JOHN C. DANFORTH
Attorney General

GARBAGE:
WASTE DISPOSAL:
CITIES, TOWNS & VILLAGES:

With respect to the Solid Waste Management Law, Senate Bill No. 387, 76th General Assembly [Sections 260.200-260.245, RSMo Supp. 1973], cities

and counties are required to provide for the collection and disposal of solid wastes including industrial wastes and may contract for such collection and disposal. Service charges may be imposed if not already imposed under some other law although such charges must be billed and collected directly by the cities or counties. General revenue of the city and federal revenue sharing funds may also be expended for such purposes.

OPINION NO. 42

February 8, 1974

Honorable J. H. Frappier
Representative, District 56
%House Post Office, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Frappier:

This opinion is in response to your questions relating to the Solid Waste Management Law, Senate Bill No. 387, 76th General Assembly, Second Regular Session (approved June 23, 1972) [Sections 260.200-260.245, RSMo Supp. 1973]. Your questions are stated as follows:

(1) "Does Act 171, adopted at the 1972 regular session of the Missouri Legislature, relating to the management of solid wastes, require a city either to provide the service directly or to contract with an independent hauler to provide service to all residents, or does the law permit a city to enact regulations which would require residents to enter into contracts with a private hauler, without the city itself becoming a party to such contractual arrangement?

(2) "If the statute is construed as requiring the city to provide garbage and refuse collection service directly or by contract, is the city required to provide such service also to commercial and industrial establishments?

(3) "Assuming the city were to enter into a contract with a hauler for the provision of

Honorable J. H. Frappier

such service, does the statute permit an arrangement whereby the contractor could bill customers directly?

(4) "Does the law permit the imposition of a separate service charge for collection service provided by the city?

(5) "Does the provision of an annual tax preclude the city from utilizing any other city funds (e.g., General Revenue, Federal Revenue Sharing Funds) for the purpose of carrying out its solid waste management program?"

Section 4.1 of the solid waste law directs that each city and county ". . . shall provide individually or collectively for the collection and disposal of solid wastes within its boundaries; . . ." (emphasis added).

Section 4.3 permits any city or county to ". . . adopt ordinances, rules, regulations, or standards for the storage, collection, transportation, processing or disposal of solid wastes which shall be in conformity with the rules and regulations adopted by the board for solid waste management systems. . . ." Section 4.4 permits any city or county to contract with any person or corporation, private or public, ". . . to carry out their responsibilities for the storage, collection, transportation, processing, or disposal of solid waste."

Therefore, in regard to your first question, it is our opinion that under the solid waste law a city must provide for the regular collection and disposal of solid wastes from all residents of the city. We believe that a city must either itself collect and dispose of all solid waste, or it must contract with some person, corporation or other governmental entity to do so. We do not believe that a city may discharge this responsibility for collection and disposal of all solid waste within its boundaries by merely adopting an ordinance requiring citizens to collect and properly dispose of their solid waste.

Section 1 of the solid waste law defines "solid waste" to mean:

" . . . garbage, refuse and other discarded materials including, but not limited to solid and semi-solid waste materials resulting from industrial, commercial, agriculture, governmental and domestic activities, . . ."

Honorable J. H. Frappier

Therefore, with reference to your second question, we believe a city must provide for the collection and disposal of garbage, refuse, and other discarded materials from commercial and industrial establishments within its boundaries.

We understand your third question to inquire if a city may, in its contract with a person or company for the collection and disposal of solid waste, authorize the contractor to charge and collect in its own behalf a fee from the owners of all premises served by the contractor. Section 4.1 of the solid waste law authorizes cities and counties to levy and collect charges for collection and disposal services. We do not believe this would allow a city or county to authorize its contractor to levy and collect service charges or to authorize the contractor to establish debtor-creditor relationships with citizens receiving the services. Therefore, we do not believe the contractor for municipal solid waste collection and disposal can bill customers directly for the service.

Section 4.1 of the solid waste law authorizes cities and counties to levy and collect service charges and to levy an annual tax, after favorable public vote (Section 10), of not to exceed ten cents on the one hundred dollars assessed valuation, in order to operate solid waste management systems. The service charge or tax authorized by this law may not be levied if such a service charge or tax is levied pursuant to some other law. Therefore, in answer to your fourth question, it is our opinion that a city may impose a solid waste collection service charge apart from the special tax for solid waste collection so long as the city is not imposing a charge for this service under the authority of some other law.

Finally, in response to your fifth question, we believe that the imposition of the special tax authorized by the solid waste law does not preclude a city from expending its other revenues collected for general municipal purposes (Article X, Section 11 (a), 11(b), Constitution of Missouri) in furtherance of a municipal solid waste management system. We also believe that imposition of a special tax for solid waste collection would not interfere with the city's use of funds received by the city pursuant to the State and Local Fiscal Assistance Act of 1972, Public Law 92-512 for the purposes of its solid waste management system.

CONCLUSION

It is the opinion of this office that with respect to the Solid Waste Management Law, Senate Bill No. 387, 76th General Assembly [Sections 260.200-260.245, RSMo Supp. 1973], cities and counties are required to provide for the collection and disposal of solid wastes including industrial wastes and may contract for such collection and disposal. Service charges may be imposed if not already

Honorable J. H. Frappier

imposed under some other law although such charges must be billed and collected directly by the cities or counties. General revenue of the city and federal revenue sharing funds may also be expended for such purposes.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Louren R. Wood.

Yours very truly,

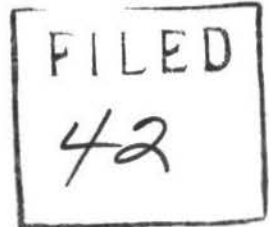
A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent and the last name "Danforth" written in a more compact, flowing style.

JOHN C. DANFORTH
Attorney General

March 20, 1974

ADDENDUM TO OPINION NO. 42

Honorable J. H. Frappier
Representative, District 56
Room 202J, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Frappier:

Since issuing our Opinion No. 42 dated February 8, 1974, to you, we have been advised that some confusion exists with respect to that part of the opinion dealing with the responsibility of the counties to provide for the collection and disposal of solid wastes, and whether private solid waste disposal services may continue to operate in unincorporated areas of the counties.

It should be clear that subsection 2 of Section 260.220 expressly provides that such county plan shall:

"(6) Allow private solid waste disposal services to continue to operate in unincorporated area [sic] of counties so long as such services are operated in a manner consistent with the policies and standards established under sections 260.200 to 260.245;"

Such private haulers who contract directly with their customers obviously have the right to charge and bill such customers directly.

The exception we have quoted merely permits private services to operate in unincorporated areas of the county but does not relieve the counties of the duty to furnish such services either directly or by contract in the absence of adequate private services.

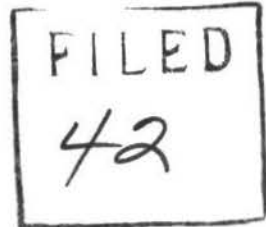
Yours very truly,

JOHN C. DANFORTH
Attorney General

March 20, 1974

ADDENDUM TO OPINION NO. 42

Honorable J. H. Frappier
Representative, District 56
Room 202J, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Frappier:

Since issuing our Opinion No. 42 dated February 8, 1974, to you, we have been advised that some confusion exists with respect to that part of the opinion dealing with the responsibility of the counties to provide for the collection and disposal of solid wastes, and whether private solid waste disposal services may continue to operate in unincorporated areas of the counties.

It should be clear that subsection 2 of Section 260.220 expressly provides that such county plan shall:

"(6) Allow private solid waste disposal services to continue to operate in unincorporated area [sic] of counties so long as such services are operated in a manner consistent with the policies and standards established under sections 260.200 to 260.245;"

Such private haulers who contract directly with their customers obviously have the right to charge and bill such customers directly.

The exception we have quoted merely permits private services to operate in unincorporated areas of the county but does not relieve the counties of the duty to furnish such services either directly or by contract in the absence of adequate private services.

Yours very truly,

JOHN C. DANFORTH
Attorney General

STATE UNIVERSITY:
UNIVERSITY OF MISSOURI:

The Board of Curators of the University of Missouri may assume responsibility for operation of the Residence Center in Independence currently operated by Central Missouri State University and the Center may be operated as a part of the University of Missouri at Kansas City at the discretion of the curators.

OPINION NO. 43

January 24, 1974

Honorable Alex J. Fazzino
Representative, District 22
Room 302, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Fazzino:

This official opinion is in response to your request for a ruling on the following question:

"May the governing boards of the University of Missouri and Central Missouri State University effect a transfer of responsibility for operation of the Residence Center in Independence currently operated by CMSU to the Kansas City campus of the University of Missouri?"

You have furnished us with the following factual background for your question:

"In recent years Central Missouri State University has operated a Residence Center in Independence. The building in which the Center is operated is owned by the Jackson County College Committee, which has a bonded indebtedness on the building of approximately \$855,000. The Committee allows CMSU to use the building at a cost of \$3.00 per student semester hour. Courses at the Center are taught by CMSU faculty members, and students who enroll at the Center pay \$22.00 per semester hour to CMSU. This includes the \$3.00 for use of the building. There are approximately 2,100 students enrolled at the Center.

"Following a recent controversy over the giving of state aid to CMSU for students enrolled

Honorable Alex J. Fazzino

at the Center, it has been suggested that responsibility for operation of the Center be transferred to the Kansas City campus of the University of Missouri."

This opinion does not concern itself with the propriety of the operation in recent years of the Independence Residence Center by CMSU. It is the understanding of this office that CMSU has decided to cease its operation of the Center. Thus, the relevant question is whether the Board of Curators of the University of Missouri has the authority to assume responsibility for the Center, not whether any "transfer" from CMSU to UMKC would be proper.

The starting point of our inquiry is Article IX, Section 9 (a) of the Missouri Constitution, which reads as follows:

"The government of the State University shall be vested in a board of curators consisting of nine members appointed by the governor, by and with the advice and consent of the senate."

Throughout the years, this provision has been construed so as to give extensive power to the university curators to establish academic programs and select building sites without legislative approval. This power has been held to authorize the sale of dormitory bonds, State ex rel. Curators of University of Missouri v. McReynolds, 193 S.W.2d 611 (Mo. banc 1946), to authorize the construction and financing of parking facilities, State ex rel. Curators of University of Missouri v. Neill, 397 S.W.2d 666 (Mo. banc 1966), and to authorize university ownership and operation of a commercial radio station, Opinion No. 19, Cox, August 1, 1952, copy enclosed. Each of these rulings notes the wide powers which have traditionally been exercised by the curators of the University.

More specifically relevant here, it should be noted that the establishment of the branch campuses currently operating in Kansas City and St. Louis was done by action of the curators, not by legislation. The story of the acquisition of the University of Kansas City and the formation of UMKC is related by the Supreme Court in Curators of University of Missouri v. University of Kansas City, 442 S.W.2d 66 (Mo. banc 1969). The transfer of the facilities was accomplished by a contract between the UKC and the university curators; one condition of the contract was the approval of an appropriation by the General Assembly:

". . . It was stated the transactions could not be completed unless, not later than September 1, 1963, the General Assembly had enacted and the Governor signed, a law appropriating to the use of the curators for the

Honorable Alex J. Fazzino

operation of a university in Kansas City during the 1963-65 biennium a sum not less than \$7,100,000 (which was done, see Laws of 1963, p. 43, approved July 8, 1963)." 442 S.W.2d, at 69-70

As can be seen by this account, the only legislative action taken with respect to the creation of UMKC was the approval of an appropriation bill; no other enabling legislation was passed. Since the General Assembly cannot legislate in an appropriation bill, Missouri Constitution, Article III, Section 23; State ex rel Gaines v. Canada, 113 S.W.2d 783, 790 [14-18] (Mo. banc 1938), rev'd. on other grounds, 305 U.S. 337 (1938); it appears that the legislature must have believed that the curators already had the authority to enter into the transfer of the property. Further, the opinion by the Supreme Court gives no indication that either the judges or the parties were in any way troubled by the legality of the actions of the curators in establishing a new campus.

If, as it appears from the above, the curators have the authority to create a new campus, then they must also have the authority to expand a campus already created, either through the construction of new facilities or through the purchase or lease of existing facilities.

Examining the question you asked in this light, we believe that the curators may contract with the owners of the Independence Residence Center and establish the Center either as an independent campus or as a part of UMKC. The staff of the Center would be employed by the University of Missouri, and the facility would possess whatever status the curators decided to give it.

CONCLUSION

It is, therefore, the opinion of this office that the Board of Curators of the University of Missouri may assume responsibility for operation of the Residence Center in Independence currently operated by Central Missouri State University and that the Center may be operated as a part of the University of Missouri at Kansas City at the discretion of the curators.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Richard E. Vodra.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 19
8-1-52, Cox

1

PAROLE: (1) The five-year additional parole period provided in Section 195.221, RSMo Supp. 1971, does not apply to persons convicted under Section 195.240, RSMo Supp. 1971, of selling, giving or delivering apparatus for the unauthorized use of controlled substances. (2) The parole of individuals convicted under Section 195.240, RSMo Supp. 1971, for selling, giving or delivering apparatus for the unauthorized use of a controlled substance should be governed by the provisions of Chapter 549, RSMo 1969.

OPINION NO. 45

February 25, 1974

Mr. W. R. Vermillion, Chairman
Board of Probation and Parole
Post Office Box 267
Jefferson City, Missouri 65101



Dear Mr. Vermillion:

This is in reply to the request of your predecessor for an opinion of this office concerning the applicability of Section 195.221, RSMo Supp. 1971, to a conviction under Section 195.240, RSMo Supp. 1971, for the sale of narcotic apparatus. Section 195.221 reads as follows:

"Notwithstanding section 549.275, RSMo, if the board of probation and parole releases any person from a state penal institution who was convicted of selling, giving, or delivering a controlled substance as defined in this chapter, the period of parole shall be for not less than the completion of the original sentence plus five years. If, however, he is found to have violated the conditions of his parole, he shall be recommitted to confinement by the department of corrections for the remainder of the term set by the original sentence from which he was paroled."

Your question in regards to the foregoing statute is whether the additional five-year parole period set out in this section applies to convictions for selling narcotic apparatus. Our research leads us to the conclusion that Section 195.221 applies only to convictions for the sale, gift or delivery of controlled substances,

Mr. W. R. Vermillion

and not to a conviction for the sale or transfer of an apparatus or device for the unauthorized use of said substances.

At the present time no case law has been developed interpreting Section 195.221, RSMo Supp. 1971. Therefore, our opinion must be based on the rules of construction applicable to criminal statutes.

The primary rule of construction in regards to criminal statutes is that they are to be construed strictly and given no broader application than is warranted by their plain and unambiguous terms. State v. Wilbur, 462 S.W.2d 653 (Mo. 1971); Willis v. American National Life Insurance Company, 287 S.W.2d 98 (Spr.Ct.App. 1956); and State v. Getty, 273 S.W.2d 170 (Mo. 1954).

As a consequence of the above guidelines, the rule has developed that a criminal statute should not be construed to include individuals other than those specifically enumerated in the law. This rule was set out in State v. Hall, 351 S.W.2d 460 (K.C.Mo.App. 1961) when the court stated:

" . . . A criminal statute is not to be held to include offenses or persons other than those which are clearly described and provided for both within the spirit and letter of the statute, . . . " Id. at 463.

See State v. McClary, 399 S.W.2d 597 (K.C.Mo.App. 1966); and Parvey v. Humane Society of Missouri, 343 S.W.2d 678 (St.L.Ct.App. 1961).

Section 195.221 applies to any person who is convicted of selling, giving or delivering a controlled substance as defined in Chapter 195. A controlled substance is defined in Section 195.010(6) as a drug, substance or immediate precursor listed in schedules I to V of Chapter 195. No mention is made of apparatus or devices for the use of drugs in this definition or in the schedules set out in Section 195.017, RSMo Supp. 1971. Therefore, the plain meaning of Section 195.221 leads to the conclusion that the additional five-year parole provision of the section only applies to those convicted of selling, giving or delivering controlled substances in violation of the chapter.

Section 195.221 cannot be applied to individuals other than those who are clearly described in the statute. If Section 195.221 were construed so as to include individuals who sell devices for the use of controlled substances, as well as those who sell the controlled substances themselves, the section would reach beyond its scope. Since the parole provisions of Section 195.221 cannot be applied to those convicted of selling narcotic paraphernalia, it seems clear that the provisions of Chapter 549, RSMo 1969, should control the parole of these individuals.

Mr. W. R. Vermillion

CONCLUSION

It is, therefore, the opinion of this office that:

(1) The five-year additional parole period provided in Section 195.221, RSMo Supp. 1971, does not apply to persons convicted under Section 195.240, RSMo Supp. 1971, of selling, giving or delivering apparatus for the unauthorized use of controlled substances.

(2) The parole of individuals convicted under Section 195.240, RSMo Supp. 1971, for selling, giving or delivering apparatus for the unauthorized use of a controlled substance should be governed by the provisions of Chapter 549, RSMo 1969.

The foregoing opinion, which I hereby approve, was prepared by my assistant, William F. Arnet.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

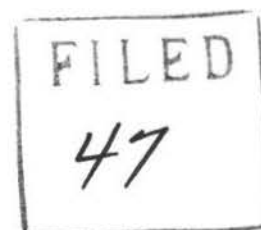
JOHN C. DANFORTH
Attorney General

FIREMEN: A physical examination, in order to qualify as an examination raising the statutory presumption of evidence provided in Section 87.006, RSMo 1969, must be a medical examination given by a qualified physician which is directed to the detection of disease of the lungs or respiratory tract, hypotension, hypertension or disease of the heart, such that the examination, with reasonable medical certainty, will reveal the absence of disease of the lungs or respiratory tract, hypotension, hypertension or disease of the heart.

OPINION NO. 47

February 19, 1974

Honorable Kenneth J. Rothman
Representative, District 77
Room 309, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Rothman:

This opinion has been prepared in response to your recent request. The question you presented in that request was:

"What would constitute a proper physical examination for the purposes of House Bill 240 . . . as required by lines 6 and 7 of said bill, so as to make a person covered by the bill eligible for its benefits?"

Attached to your request was a copy of House Bill No. 240 which was enacted by the 75th General Assembly and included in the Revised Statutes of Missouri of 1969 as Section 87.006. That section provides:

"1. Notwithstanding the provisions of any law to the contrary, and only for the purpose of computing retirement benefits provided by an established retirement plan, after five years' service, any condition of impairment of health caused by any disease of the lungs or respiratory tract, hypotension, hypertension, or disease of the heart resulting in total or partial disability or death to a uniformed member of a paid fire department, who successfully passed a physical examination within five years prior to the time a claim is made for such disability or death, which examination failed to reveal

Honorable Kenneth J. Rothman

any evidence of such condition, shall be presumed to have been suffered in line of duty, unless the contrary be shown by competent evidence.

"2. This section shall apply to paid members of all fire departments of all counties, cities, towns, fire districts and other governmental units."

Although we could find no previous judicial constructions of Section 87.006, RSMo 1969, the same language as to presumption in Section 87.005, RSMo 1969, was construed in McCarthy v. Board of Trustees of the Firemen's Retirement System of St. Louis, 462 S.W. 2d 827 (St.L.Ct.App. 1970). Section 87.005 provides as follows:

"1. Notwithstanding the provisions of any law to the contrary, after five years' service, any condition of impairment of health caused by any disease of the lungs or respiratory tract, hypertension, or disease of the heart resulting in total or partial disability or death to a uniformed member of a paid fire department, who successfully passed a physical examination within five years prior to the time a claim is made for such disability or death, which examination failed to reveal any evidence of such condition, shall be presumed to have been suffered in line of duty, unless the contrary be shown by competent evidence.

"2. This section shall apply only to the provisions of chapter 87, RSMo 1959."

McCarthy v. Board of Trustees of the Firemen's Retirement System of St. Louis involved an appeal from an affirmance by the circuit court of a decision of the Board of Trustees of the Firemen's Retirement System of St. Louis denying the plaintiff's claim for an additional annual pension which the plaintiff sought on the ground that his disability was service connected. The plaintiff had presented evidence of having successfully passed a physical examination within five years prior to the time of his claim for disability due to heart disease, and because the examination did not reveal evidence of heart disease, the appellant argued that his disabling heart condition was presumed to have been suffered in the line of duty under Section 87.005, RSMo. The St. Louis Court of Appeals construed the operative words of that section in its opinion holding that the physical examination upon which

plaintiff-appellant McCarthy relied was insufficient to raise the presumption under Section 87.005, RSMo. The St. Louis Court of Appeals stated:

"... the words 'physical examination' in § 87.005 are not to be interpreted out of context but in relation to the statute as a whole. State ex rel. Wright v. Carter, Mo., 319 S.W.2d 596 [7]. And, as said in Rutter v. Carothers, 223 Mo. 631, 122 S.W. 1056, at l. c. 1059: '* * * the practical administration of the law through the courts would quite miss refined and elevated justice in many instances if the naked and cold words of the statute were not warmed into life and good sense by seeking, finding, and reading into the law its true spirit and intentment.' In interpreting a statute we must presume that the legislature intended a logical and reasonable result. Igoe v. Slaton Block Co., Mo.App., 329 S.W.2d 39 [6]; Globe-Democrat Pub. Co. v. Industrial Commission, Mo.App., 301 S.W.2d 846 [3-5].

"The 'physical examination' prescribed in § 87.005 is clearly related to the absence of heart disease. We must assume that in using those words the legislature did not mean any physical examination for that would produce an illogical result; instead we interpret the words 'physical examination' as applied to this case to mean one that did, with reasonable medical certainty, reveal the absence of heart disease." (462 S.W.2d at 831)

The court arrived at this construction after having noted that the power of the legislature to make an evidentiary rule of presumptive evidence is subject to the requirement that in statutes creating an evidentiary presumption there must be a rational connection between the fact proved and the ultimate fact to be established. Thus, in Section 87.005, a logical connection between the successful passing of a medical examination and the fact that subsequent disability was suffered in the line of duty exists only if the physical examination was one which, with reasonable medical certainty, should have revealed the absence of heart disease. In the McCarthy case, because the medical examination was only a general physical examination, rather than one directed to the inquiry of whether heart disease was present, it was insufficient as a physical examination prescribed in Section 87.005 because it was not a

physical exam which, with reasonable medical certainty, would reveal the absence of heart disease.

Applying this construction to the identical operative language of Section 87.006, RSMo 1969, a physical examination sufficient to raise the presumption created by this section should be a physical examination directed to the detection of any disease of the lungs or respiratory tract, hypotension, hypertension, and disease of the heart, such that the examination will, with reasonable medical certainty, reveal the absence of diseases of the lungs or respiratory tract, hypotension, hypertension or disease of the heart.

A second problem implied in your request is the question of by whom an examination qualified to raise the presumption under Section 87.006 must be given. Several of the sections of Chapter 87, RSMo 1969, provide for the designation of a medical officer or medical board to examine and determine the physical and mental condition of applicants for benefits. See Sections 87.045, 87.160, and 87.435, RSMo 1969. Thus, it could be argued that an examination which qualifies to raise the presumption of Section 87.006 must be made by the medical officer or medical board designated to make other physical examinations under this statutory scheme. However, this clearly was not the construction in McCarthy v. Board of Trustees of the Firemen's Retirement System of St. Louis, supra. There, the examination which the plaintiff argued was an examination under Section 87.005 was given by the plaintiff-appellant's private physician. The appellate court's opinion holding that the physical examination did not qualify to raise the statutory presumption clearly relied on the scope of the examination as the determinative factor. Had the court believed a physical examination by private physician did not qualify to raise the statutory presumption, the appellate court opinion would not have reached the question concerning the scope of the examination. Therefore, an examination under Section 87.005, in order to qualify to raise the statutory presumption, need not be given by the medical officer or medical board designated by the Board of Trustees under the various statutory schemes to examine persons applying for benefits. Likewise, the same conclusions should be drawn concerning the identical operative language of Section 87.006, RSMo 1969.

CONCLUSION

It is the opinion of this office that a physical examination, in order to qualify as an examination raising the statutory presumption of evidence provided in Section 87.006, RSMo 1969, must be a medical examination given by a qualified physician which is directed to the detection of disease of the lungs or respiratory

Honorable Kenneth J. Rothman

tract, hypotension, hypertension or disease of the heart, such that the examination, with reasonable medical certainty, will reveal the absence of disease of the lungs or respiratory tract, hypotension, hypertension or disease of the heart.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Stephen D. Hoyne.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a long horizontal stroke at the end.

JOHN C. DANFORTH
Attorney General



OFFICES OF THE

JOHN C. DANFORTH
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

February 22, 1974

OPINION LETTER NO. 48

Honorable David Q. Reed
State Representative, District 29
Room 235A, State Capitol Building
Jefferson City, Missouri 65101

Dear Representative Reed:

This is in response to your request for an opinion upon the following question:

"Is it legal for a Member of the General Assembly to supplement the salary of a secretary employed by the General Assembly to do his work, by paying her additional compensation above and beyond her State salary, the source of such compensation being the member's private funds."

Section 21.150, RSMo Supp. 1973, provides for the manner in which the rate of pay of legislative employees is to be established. That section provides that the accounts committees of the House of Representatives and the Senate shall on the 15th of December of each even numbered year establish the rates of pay for all stenographic, clerical or administrative employees of both houses. The rates of pay thus established shall be the same as that for persons employed under the direction and established policies of the Personnel Division of the Office of Administration for comparable duties. It is our opinion that the limitations of the above statute do not apply in the present situation.

A predecessor of the above section, Wagner Statutes, page 904, Section 6, 1870, provided that the compensation fixed for

Honorable David Q. Reed

legislative employees could not be increased or decreased during the term of employment:

"[E]ither by appropriations out of the contingent funds of either house, or, otherwise, in any manner whatever."

This section was held to prohibit extra compensation to clerks for night work as provided by a resolution of the House of Representatives. State ex rel. First National Bank v. Holliday, 61 Mo. 229 (1875). The court held that the house resolution providing extra compensation for night work violated the per diem limitation on compensation of the clerks. The court, however, indicated in its opinion the purpose behind this section.

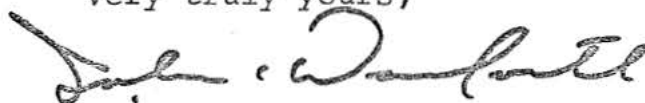
"The reasons which prompted the enactment of the law are familiar to all who are acquainted with the legislation of the state. The habit has been, at the end of each session of the legislature, to vote the people's money as extra compensation to clerks over and above their regular pay. This practice was designed by the law to be wholly prohibited. . . ." Id. at 231.

It seems clear that the 1870 law as well as the present statute are concerned with the manner in which public funds are disbursed. Logically, then, Section 21.150 has no application to a situation, like the present one, in which no public funds are involved. It is our opinion that the limit on the rate of pay set by Section 21.150 is actually a limit only on the amount of state funds to be expended. We do not believe that compensation received solely from a member of the General Assembly would constitute pay within the meaning of the above statute.

Chapter 558, RSMo 1969, deals with offenses relating to official duties. We find nothing in this chapter which would prohibit a member of the General Assembly paying his secretary additional compensation.

Therefore, it is our view that it is legal for a member of the General Assembly to pay additional compensation to his secretary, above and beyond her state salary, provided that, the source of such compensation is solely the member's own fund.

Very truly yours,



JOHN C. DANFORTH
Attorney General

SCHOOLS: (1) Each county having federal flood control
ASSESSMENTS: lands should assess the federal property in
FLOOD CONTROL: each school and road district in the county
ROAD DISTRICTS: on the same basis as if it were privately
owned, (2) the allocation of federal lease-
back funds among the eligible districts should be based on the
hypothetical tax yield of the federal property in each district,
and not on a simple acreage basis, (3) the money should be distri-
buted to the several districts by the county court as soon as the
proper allocation has been computed, (4) a school or road district
may bring a mandamus action against its county court to compel the
distribution of the leaseback funds, and (5) a junior college dis-
trict is eligible to receive federal flood control leaseback funds
on the same basis as other school districts in the county.

OPINION NO. 51

January 29, 1974

Honorable Al Nilges
Representative, District 126
%House Post Office, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Nilges:

This opinion is in response to your request for a ruling on
the following questions:

"We would appreciate an opinion concerning
the distribution of leaseback funds accruing
to the three Counties of Missouri, Washington,
Crawford, and Franklin from the U. S. Army
Corps of Engineers Meramec Park Lake Project.
State statutes concerning this matter seem to
leave much room for interpretation. Presently,
the funds accruing from this project have not
been made available to the several school dis-
tricts within the project as the law directs.

"Specifically, questions arise as to the mean-
ing of 'if the property were privately owned'
(RSMo 1969 Sec. 12.100). On what assessment
should the levy be applied? Additionally,
should all moneys accruing to the project be
lumped together and divided on an acreage
basis? Or, should the funds accruing from
specific tracts leased back apply directly
to the district or districts they are in?

Honorable Al Nilges

Another issue not clearly defined is when should the funds be given to the school districts and what redress, if any, do the school districts have concerning funds held by the County Courts past the time of disbursement?

"Please define whether or not a public Junior College of the state is considered a school district and should be included in any distribution of funds to the school districts involved."

Under the Flood Control Act, 33 U.S.C. Sections 701, et seq. (1970), the federal government has acquired property in many parts of the country, including the counties involved in this opinion request, as part of the attempt to control floods on the navigable waters of this country and to aid the states in developing the watersheds within their boundaries. 33 U.S.C. Section 701-1. This federal acquisition of property could create a financial burden on the states affected, however, since it removes the acquired land from the local tax rolls. To ease this burden, the federal government returns to the states each year seventy-five percent of all moneys received by the United States "on account of the leasing of lands acquired by the United States for flood control." 33 U.S.C. Section 701c-3. These payments to the states are commonly known as "leaseback" payments.

The state of Missouri has accepted this money, and distributes the federal funds to each county which has federally-owned flood control land within its boundaries. Sections 12.080 and 12.090, RSMo 1969. The county courts are then instructed to allocate the money they receive according to the procedures set forth in Section 12.100, RSMo 1969, which reads as follows:

"The county court of each county receiving any such moneys shall use the funds to aid in maintaining the schools and roads and for defraying any of the expenses of the county in accordance with the provisions set forth in sections 12.070 and 12.080. The county court shall allow to the school districts and for roads an amount based upon their respective levies equal to that which would ordinarily be allowed to them out of taxes from property owned by the United States if the property were privately owned before using any of the moneys for defraying other expenses of the county."

With this background, we may now turn to the questions in your opinion request:

Honorable Al Nilges

(1) First, on what assessment should the levies for schools and roads be applied? Section 12.100 states that the county should compute a hypothetical tax on the property as "if the property were privately owned." We believe this requires that the flood control property in each separate district be assessed as if it were subject to taxation. Opinion No. 179, Babbitt, August 16, 1965. Further, this assessment, like any assessment, may be changed from year to year as property values change. Chapter 137, RSMo.

(2) Your next question asks about the basis upon which the money received under Sections 12.080 and 12.100, RSMo 1969, is to be divided among the school and road districts eligible to receive it. These questions are dealt with in Opinion No. 107, Lawson, April 20, 1972, copy enclosed, and in the opinions it relies upon. Opinion No. 107 concludes as follows:

"Therefore, in specific response to your questions, we are of the opinion that the Monroe County Court must allocate Flood Control Act funds to the school districts and roads wherein the federal property is situated in an amount which will equal the amount that would otherwise be available to the school districts and for roads through taxation of the property. Any remaining balance may be used by the county court for other county purposes. If the Federal Flood Control funds available to the county are insufficient in any year to equal all lost tax revenues attributable to the federal acquisition of the property, the county court should make an equitable apportionment of such funds among the affected school districts and for roads."

(3) You also ask when the money received by the counties is to be distributed to the schools. This question is not specifically answered in the statutes. However, Section 12.090, RSMo 1969, requires the Commissioner of Administration (who replaces the Comptroller with the enactment of Section 26.300(3), RSMo Supp. 1971) to distribute the federal money to the counties "within a reasonable time after receipt of the money from the federal government." We believe that the county court and the county treasurer should similarly allocate and distribute the money "within a reasonable time" after the county receives it. It is impossible to formulate an exact timetable because the necessary assessment and allocation computations may require more time in some counties than others. However, once the computations are completed, the money should be distributed forthwith.

Honorable Al Nilges

(4) Your next inquiry concerns what redress a district has if the money is not distributed properly or promptly. In Opinion No. 65, Murrell, May 4, 1951, copy enclosed, this office ruled that a school district could bring a mandamus action to compel another district to pay tuition for one of its students attending schools in the first district since the other district was required by statute to make the payment. The same principle would apply here. The county court is required by Section 12.100 to allocate the funds among the eligible districts. If it fails to do so, the districts affected could ask for a writ of mandamus to order the county court to perform its statutory duty.

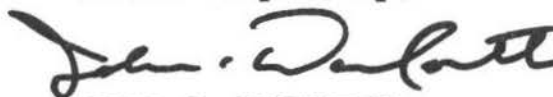
(5) Finally, you ask whether a junior college district is eligible to receive funds under Sections 12.080 through 12.100. In Opinion No. 182, Eads, May 5, 1971, copy enclosed, this office ruled that a junior college district was eligible to receive National Forest Reserve Funds distributed pursuant to Section 12.070, RSMo 1969. We have compared the language of Sections 12.070 and 12.080 and the federal statutes on which they are based, and we conclude that the reasoning in Opinion No. 86 should be followed here as well. Therefore, a junior college district may receive funds received and distributed pursuant to Section 12.080.

CONCLUSION

It is, therefore, the opinion of this office: (1) that each county having federal flood control lands should assess the federal property in each school and road district in the county on the same basis as if it were privately owned, (2) that the allocation of federal leaseback funds among the eligible districts should be based on the hypothetical tax yield of the federal property in each district, and not on a simple acreage basis, (3) that the money should be distributed to the several districts by the county court as soon as the proper allocation has been computed, (4) that a school or road district may bring a mandamus action against its county court to compel the distribution of the leaseback funds, and (5) that a junior college district is eligible to receive federal flood control leaseback funds on the same basis as other school districts in the county.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Richard E. Vodra.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Honorable Al Nilges

Enclosures: Op. Ltr. No. 179
8-16-65, Babbitt

Op. Ltr. No. 107
4-20-72, Lawson

Op. No. 65
5-4-51, Murrell

Op. No. 182
5-5-71, Eads

July 12, 1974

OPINION LETTER NO. 52

Answer by letter-Blackmar

Mr. Charles O'Halloran
State Librarian
Missouri State Library
308 East High Street
Jefferson City, Missouri 65101

Dear Mr. O'Halloran:

This is in response to your request for an opinion on the following questions:

- "1. Must an individual be a resident of a city or a county library district in order to be appointed to the board of trustees?
- "2. Should an individual, serving as a member of a board of trustees, remove his residence from the library district, may he continue to serve as a member of the board of trustees?"

With respect to a city library district, Section 182.170, RSMo 1969, provides:

"When any city establishes and maintains a public library under sections 182.140 to 182.301, the mayor or other proper official of the city, with the approval of the legislative branch of the city government, shall proceed to appoint a library board of nine trustees, chosen from the citizens at large, with reference to their fitness for the office. No member of the city government shall be a member of the board."

Mr. Charles O'Halloran

Section 182.190, RSMo 1969, goes onto provide that vacancies on the board of trustees are to be filled in the same manner, except that when the vacancy is an unexpired term, the appointment shall be made only for the unexpired portion of the term.

We believe that the words "chosen from the citizens at large" in Section 182.170 indicate a legislative intent that the board members of a city library district are to be residents of the city. Otherwise, those words would have no meaning.

The Missouri courts have held that when residency is a requirement for election or appointment to a public position an officer who ceases to be a resident forfeits his position. See State ex rel. Johnston v. Donworth, 105 S.W. 1055 (St.L.Ct.App. 1907) and State ex rel. City of Republic v. Smith, 139 S.W.2d 929 (Mo. Banc 1940).

When a member of the city library board ceases to be a resident of the city, he forfeits his office and the vacancy may be filled by appointment as provided for by Section 182.190. Until the vacancy is filled, the city library district board member would be a de facto board member and his acts as a board member would be valid. See State v. Smith, supra, and Opinion No. 81, Gant, 1972.

With respect to a board member of a county library district, there is no statutory or constitutional requirement that the board member be a resident of the county library district (although under Article VII, Section 8 of the Constitution, the board member must be a resident of the state). In particular, Section 182.050, RSMo 1973 Supp., providing for the appointment of county library district board members--a section similar to 182.170, RSMo 1969, providing for the appointment for city board members--does not require county library district residency, nor are there any words in that section from which such a requirement may be inferred. While we find no Missouri cases which have considered the precise question, the general rule is where residence within the district or political unit is not made a condition of eligibility to holding office by express provision of law, residence within the district is not considered necessary, 63 Am.Jur.2d Public Officers and Employees §47. We believe Missouri courts would follow this general rule. Therefore, a county library district board member need not be a resident of the county library district.

It is, therefore, our view that a board member of a city library district must be a resident of the city, but that a board

Mr. Charles O'Halloran

member of a county library district need not be a resident of the county library district. In the event that a city library district board member ceases to be a resident, a vacancy in office exists which may be filled as other vacancies, but until such vacancy is filled, the board member is a de facto member.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 81
8-2-72, Gant



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

June 12, 1974

OPINION LETTER NO. 53

Ms. Margie L. Butler
Executive Secretary
Missouri State Board
of Cosmetology
201 Bolivar Street
Jefferson City, Missouri 65101

Dear Ms. Butler:

This letter is in response to your request for an opinion of this office on the following question:

"Can an instructor in a school make appointments for patrons and do the actual hair-dressing on these patrons and receive gratuity other than their salary as an instructor?"

As we understand, this question was brought about because during the regular inspection of one of the cosmetology schools, the inspector observed one of the instructors working on a patron as a cosmetologist and the patron was paying the individual a specific fee for her services. The instructor stated that the patron was being used for demonstration purposes.

In answering this question, it would be extremely difficult for this office with its limited information to pass judgment on the myriad of fact situations which could arise as to any specific situation and whether in fact the students were actually being given a demonstration as alleged. Therefore, this opinion will be general in nature and shall not be construed as ruling on any specific fact situation which may have arisen or which may arise.

Section 329.040, RSMo 1969, requires that all schools for any of the classified occupations as set forth in Section 329.020

Ms. Margie L. Butler

(i.e., cosmetologists and manicurists) must be registered with the Board. The course of training for cosmetologists must be a minimum of 1,220 hours over a period of six months in a registered school. With regard to the specific training, Section 329.040.2 provides in pertinent part:

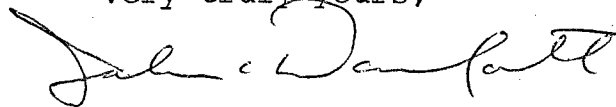
" . . . such training to include practical demonstrations, written or oral tests, and practical instructions in sanitation, sterilization and the use of antiseptics, cosmetics and electrical appliances, consistent with the practical and theoretical requirements as applicable to the classified occupations as provided in this chapter; . . ."

In Opinion 223 (1967), copy enclosed, this office held that the sufficiency of an applicant's training is to be determined by the Board of Cosmetology and not the school.

Chapter 329 does not vest any regulatory functions in the Board to govern the contractual arrangements between an individual instructor and a school as to the amount of compensation. Accordingly, we believe that the matter of whether an instructor receives a fee from a patron on whom demonstration work is being performed or whether the instructor receives a set salary is a private matter between an individual and the school.

The statute clearly provides that part of a school's course of training shall consist of practical demonstrations. We believe it would be quite proper, therefore, for an instructor to perform certain functions on a patron and at the same time be giving a demonstration to students as to how to do a particular skill. Of course, this could be abused by an instructor if the students are not really being provided sufficient training. If instructors are going to perform hairdressing services on patrons and if students are to be given credit during that period of time there must be a bona fide demonstration occurring.

Very truly yours,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 223
6-1-67, Casey



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

June 18, 1974

JOHN C. DANFORTH
ATTORNEY GENERAL

OPINION LETTER NO. 55

Honorable David Q. Reed
Representative, District 29
2010 Traders National Bank Building
1125 Grand Avenue
Kansas City, Missouri 64106

Dear Representative Reed:

This letter is in response to your questions asking:

"1. Does the establishment by a constitutional charter city of a fixed-sum occupational license tax for some classes of taxpayers and the establishment of an occupational license tax rate graduated in proportion to annual gross receipts for other classes, violate the principal of equal protection of the law as guaranteed by Amendment 14, Constitution of U.S., and Article I, Section 2, Constitution of Missouri, 1945, as applied to such taxpayers?

"2. Does such a tax scheme offend against the uniformity of taxation requirements of Article X, Section 3, Constitution of Missouri, 1945.

"3. Do the requirements of Sec. 148.440, R.S. Mo., providing a fixed fee '***in lieu of all taxes and licenses which the city may possess the power to impose***' conflict with the provision of Sec. 92.030(1), R.S. Mo. which authorizes cities to tax real and tangible personal property within their jurisdiction on the basis of value and does Section 148.440, R.S. Mo. further conflict with Article X, Sec. 4(b) Constitution of Missouri 1945, which requires that

Honorable David Q. Reed

that property in classes land 2 (real property and tangible personal property) be assessed on the basis of value?

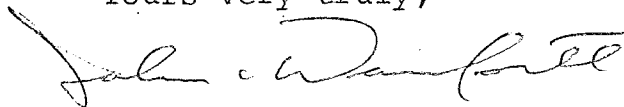
"4. With respect to constitutional charter cities, do the provisions of Section 148.440, R.S.Mo., which require municipal collectors of revenue to issue occupational licenses to insurance companies and to renew such licenses from year to year upon demand, conflict with Article VI, Section 22, Constitution of Missouri, 1945, which provides in part: 'Section 22. No law shall be enacted creating or fixing the powers, duties or compensation of any municipal office or employment, for any city framing or adopting its own charter under this or any previous constitution***'"

In answer to the constitutional questions posed by your questions 1, 2, 3, and 4, it is our view that such constitutional provisions are not violated in the premises.

It is a well-settled principle of constitutional construction that only when there is a clear conflict between a legislative enactment and the Constitution are the courts warranted in declaring the law to be void. In the Matter of Burris, 66 Mo. 442, 450 (1877); Borden Company v. Thomason, 353 S.W.2d 735, 743 (Mo. Banc 1962). We find no clear violation and therefore conclude that the courts would uphold such provisions.

With respect to your third question asking whether Section 148.440, RSMo, is in conflict with Section 92.030, RSMo, we are of the view that since the former section is to be construed as referring to municipal occupational license taxes and the latter to ad valorem taxes there is no conflict.

Yours very truly,



JOHN C. DANFORTH
Attorney General



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

April 9, 1974

OPINION LETTER NO. 56

Honorable Donald L. Manford
State Senator, District 8
Room 425, Capitol Building
Jefferson City, Missouri 65101

Dear Senator Manford:

This letter is in response to your question asking:

"Does a judge of a municipal court of a constitutional charter city have the power to grant bench paroles in vehicular and general ordinance cases? Is this power inherent in the court?"

Additionally, you have provided the following hypothetical factual situation:

"City A, a constitutional charter city having municipal courts--defendant B is charged under and found guilty of a violation of an ordinance of said city--can judge by inherent power of the municipal court grant B a bench parole?"

From your question and the hypothetical example we assume that the constitutional charter makes no reference to such authority.

Since your question is purely hypothetical, we do not rule concerning the charter or code provision of any specific constitutional charter city. A ruling as to any constitutional charter city would require an analysis of such city's charter and code provisions.

A bench parole is a conditional release from physical custody of a convicted and sentenced defendant ordered by a judge of the convicting court. The prisoner is released upon conditions

Honorable Donald L. Manford

to be observed by him, but his conviction and sentence remain in force and he continues in constructive custody. See State v. Brinkley, 193 S.W.2d 49 (Mo. 1946) and 59 Am.Jur.2d Pardon and Parole §78, p. 53.

In Ex Parte United States, 242 U.S. 27, 61 L.Ed. 129, 37 S.Ct. 72 (1916), the United States Supreme Court held that the authority to define and fix the punishment for crime is legislative and the right to relieve from punishment fixed by law is executive in nature. The court further held that within the legislative power to define and fix punishments for crimes is the right to bring to the judicial discretion elements of consideration which would otherwise be beyond the scope of judicial authority. In Affronti v. United States, 350 U.S. 79, 100 L.Ed. 62, 76 S.Ct. 171 (1955), the same court held that the federal judicial power to grant probations springs solely from legislative action and citing Ex Parte United States, supra, held that federal district courts had no power to permanently suspend execution of sentences and release a sentenced and convicted defendant without service of the sentence prior to the Probation Act of 1925.

In State ex rel. Oliver v. Hunt, 247 S.W.2d 969 (Mo. Banc 1952), the court held that prior to the enactment of the Parole Law of 1897 all persons, no matter how extenuating the circumstances, were upon conviction required to undergo the punishment fixed by statute. In so holding the court stated at page 973:

" . . . While, in this State, we have not held that the power to suspend sentences was inherently vested in the courts, yet, unless the pardoning power granted the governor by the Constitution precludes it from doing so, it is within the power of the legislature to invest the courts with that right. The parole law does that very thing. . . ."

In Weber v. Mosley, 242 S.W.2d 273 (St.L.Ct.App. 1951), the court held a criminal judgment assessing a jail sentence is the penalty prescribed by the court for the violation of law. The essence of the judgment is the kind and amount of punishment inflicted. The judgment is to be satisfied only by undergoing the punishment inflicted unless it be remitted by the sovereign or absolved by death. The court continuing held that under the bench parole law the judicial department was granted the power to grant bench paroles in certain circumstances. In State v. Merk, 281 S.W.2d 607 (St.L.Ct.App. 1955), the court held that the granting or refusal of a bench parole is no part of the trial of the cause

Honorable Donald L. Manford

nor is it in any way incident thereto citing State ex rel. Browning v. Kelly, 274 S.W. 731 (Mo. Banc 1925).

Missouri courts have been given the authority to grant bench paroles by the legislature. Sections 549.058 to 549.197, RSMo 1969, grant such authority to circuit and magistrate courts. Section 98.250 grants a similar authority to municipal judges in second class cities. Section 74.653, repealed in 1959, granted judges of alternative form first class cities the authority to grant bench paroles. The court in State ex rel. Oliver v. Hunt, supra, held that such grants were not in conflict with the Governor's constitutional power to grant pardons.

Rule 37.67(c), V.A.M.R., pertaining to municipal and traffic courts, provides as follows:

"Any court having original jurisdiction to try offenses under these Rules may recommend to the appropriate pardon, probation or parole authorities the granting of a pardon, probation or parole for any defendant convicted and sentenced in such court, or may grant the same if authorized by law."

As there is presently no authorization by law for the granting of bench paroles by judges of municipal courts of constitutional charter cities, such courts may only make the recommendations as provided by subsection (c) quoted above.

It is, therefore, our view that courts including those of constitutional charter cities do not have inherent authority to grant bench paroles but that such authority may be constitutionally invested in those courts by the charter of such a city or by the legislature.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

May 3, 1974

OPINION LETTER NO. 57

Mr. Edwin M. Bode, Secretary
Missouri State Employees'
Retirement System
Post Office Box 209
Jefferson City, Missouri 65101

Dear Mr. Bode:

This letter is to acknowledge receipt of your request for an opinion from this office which reads as follows:

"Whether an employee of the State of Missouri is entitled to prior service credit from September 1, 1933 to July 1, 1942 while working as a civilian employee supervising activities of Civilian Conservation Corps Camp enrollees."

The employee in question has provided the following background information:

"On September 1, 1933, I reported to a Civilian Conservation Corps Camp in Indian Trails State Park. I was assigned as a member of supervisory personnel directing work activities of CCC enrollees. This work was being done on lands of the old Fish and Game Department.

"I continued in this assignment at this location, at Deer Run State Park and Refuge and Meramec State Park until July 1, 1942, at which time I was assigned the position of Construction Assistant with the Forestry Division of the Department of Conservation. The entire

Mr. Edwin M. Bode

period from 1933 to 1942 was spent as a civilian employee supervising activities of CCC enrollees doing work on lands owned by the Fish and Game Department or its successor, the Department of Conservation.

"Payment for this service was by federal check. However, work plans were developed and all work was supervised by the Fish and Game Department or the Conservation Department. Payrolls were made up and certified for payment by personnel attached to these departments.

"When the State Employees Retirement System went into effect an employee submitted a record of their prior service, I was advised not to submit this service from 1933 to 1942. At that time I did not review the law and saw no reason to question these instructions."

The Missouri State Employees' Retirement System became effective August 29, 1957, under an act of the 69th General Assembly. See Laws of Missouri, 1957, pages 707-718 and 880. At this time, subsection 1 of Section 104.340, RSMo, provided as follows:

"Any member of the system on the first day of the first month following the effective date of this act, shall be given credit for prior service with the state. All such service must be established to the satisfaction of the board."

Thus, under the above statute any employee who became a member on September 1, 1957, was entitled to credit for all service rendered prior to that date any department, division, or agency to which the system was applicable. It is our understanding that the individual in question became a member of the retirement system on September 1, 1957.

The eligibility for membership in the Missouri State Employees' Retirement System is governed by the definitions of "department" and "employee" as set forth in subsections 11 and 15, respectively, Section 104.310, RSMo. These definitions read as follows:

"(11) 'Department', any department, institution, board, commission, officer, court

Mr. Edwin M. Bode

or any agency of the state government receiving state appropriations including allocated funds from the federal government and having power to certify payrolls authorizing payments of salary or wages against appropriations made by the federal government or the state legislature from any state fund, or against trusts or allocated funds held by the State Treasurer;

* * *

"(15) 'Employee', any elective or appointive officer or employee of the state who is employed by a department and earns a salary or wage in a position normally requiring the actual performance by him of duties during not less than one thousand five hundred hours per year, including each member of the general assembly, but not including any employee who was covered under some other retirement or benefit fund to which the state is a contributor; except this definition shall not exclude any employee as defined herein who was covered only under the Federal Old Age and Survivors' Insurance Act, as amended. As used in sections 104.310 to 104.550, the term 'employee' shall include civilian employees of the Army National Guard or Air National Guard of this state who are employed pursuant to Section 709 of Title 32 of the United States Code and paid from federal appropriated funds;"

The Conservation Corps was created by Executive Order No. 6101, April 5, 1933, by authority of an act of the 73rd Congress of the United States, March 31, 1933. Such act provided in full:

"AN ACT

For the relief of unemployment through the performance of useful public work, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of relieving the acute condition of

Mr. Edwin M. Bode

widespread distress and unemployment now existing in the United States, and in order to provide for the restoration of the country's depleted natural resources and the advancement of an orderly program of useful public works, the President is authorized, under such rules and regulations as he may prescribe and by utilizing such existing departments or agencies as he may designate, to provide for employing citizens of the United States who are unemployed, in the construction, maintenance and carrying on of works of a public nature in connection with the forestation of lands belonging to the United States or to the several States which are suitable for timber production, the prevention of forest fires, floods and soil erosion, plant pest and disease control, the construction, maintenance or repair of paths, trails and fire-lanes in the national parks and national forests, and such other work on the public domain, national and State, and Government reservations incidental to or necessary in connection with any projects of the character enumerated, as the President may determine to be desirable: Provided, That the President may in his discretion extend the provisions of this Act to lands owned by counties and municipalities and lands in private ownership, but only for the purpose of doing thereon such kinds of cooperative work as are now provided for by Acts of Congress in preventing and controlling forest fires and the attacks of forest tree pests and diseases and such work as is necessary in the public interest to control floods. The President is further authorized, by regulation, to provide for housing the persons so employed and for furnishing them with such subsistence, clothing, medical attendance and hospitalization, and cash allowance, as may be necessary, during the period they are so employed, and, in his discretion, to provide for the transportation of such persons to and from the places of employment. That in employing citizens for the purposes of this Act no discrimination shall be made on account of race, color, or creed; and no person under conviction for crime and serving sentence therefor shall be employed under

Mr. Edwin M. Bode

the provisions of this Act. The President is further authorized to allocate funds available for the purposes of this Act, for forest research, including forest products investigations, by the Forest Products Laboratory.

"Sec. 2. For the purpose of carrying out the provisions of this Act the President is authorized to enter into such contracts or agreements with States as may be necessary, including provisions for utilization of existing State administrative agencies, and the President, or the head of any department or agency authorized by him to construct any project or to carry on any such public works, shall be authorized to acquire real property by purchase, donation, condemnation, or otherwise, but the provisions of section 355 of the Revised Statutes shall not apply to any property so acquired.

"Sec. 3. Insofar as applicable, the benefits of the Act entitled 'An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes', approved September 7, 1916, as amended, shall extend to persons given employment under the provisions of this Act.

"Sec. 4. For the purpose of carrying out the provisions of this Act, there is hereby authorized to be expended, under the direction of the President, out of any unobligated moneys heretofore appropriated for public works (except for projects on which actual construction has been commenced or may be commenced within ninety days, and except maintenance funds for river and harbor improvements already allocated), such sums as may be necessary; and an amount equal to the amount so expended is hereby authorized to be appropriated for the same purposes for which such moneys were originally appropriated.

"Sec. 5. That the unexpended and unlotted balance of the sum of \$300,000,000 made available under the terms and conditions of

Mr. Edwin M. Bode

the Act approved July 21, 1932, entitled 'An Act to relieve destitution', and so forth, may be available, or any portion thereof, to any State or Territory or States or Territories without regard to the limitation of 15 per centum or other limitations as to per centum.

"Sec. 6. The authority of the President under this Act shall continue for the period of two years next after the date of the passage hereof and no longer."

Section 3 of the above was repealed by the same Congress in 1934, as follows:

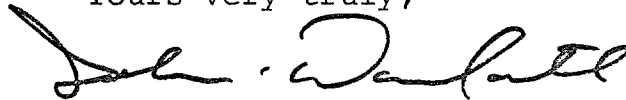
"Section 3 of the Act entitled 'An Act for the relief of unemployment through the performance of useful public work, and for other purposes', approved March 31, 1933 (48 Stat. 22), is hereby repealed, insofar as said Act applies to enrollees in the Civilian Conservation Corps, and in lieu thereof the provisions of the Act entitled 'An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes', approved September 7, 1916, as amended (U.S.C., title 5, ch. 15), are hereby made applicable to such enrollees under the said Act of March 31, 1933, to the same extent and under the same conditions as is provided for employees of the Federal Civil Works Administration in the Act entitled 'An Act making an additional appropriation to carry out the purposes of the Federal Emergency Relief Act of 1933, for continuation of the Civil Works program, and for other purposes', approved February 15, 1934 (Public, Numbered 93, Seventy-third Congress): Provided, That so much of the sum appropriated in the first paragraph of title II of this Act as the United States Employees' Compensation Commission, with the approval of the Director of the Budget, estimates and certifies to the Secretary of the Treasury will be necessary for administrative expenses and for the payment of such compensation shall be set aside in a special fund to be administered by the Commission for such purposes; and after June 30, 1935, such

Mr. Edwin M. Bode

special funds shall be available for these purposes annually in such amounts as may be specified therefor in the annual appropriation Acts."

It is our view that such acts indicate that employees of the Civilian Conservation Corps were employees of the United States government and not of the state of Missouri, within the retirement act, and that past service credit cannot be allowed for service with the Civilian Conservation Corps.

Yours very truly,

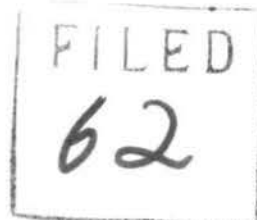
A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

January 9, 1974

OPINION LETTER NO. 62
Answer by letter-Mansur

Honorable Robert Fowler
Representative, District 69
Room 401, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Fowler:

This is in reply to your request for an opinion from this office whether a fire district board of directors located in St. Louis County or a municipal board of aldermen or councilmen in a city located in St. Louis County have the authority to prohibit any firemen from participating or working for certain candidates for county and state office. We assume that the district and municipal prohibitions apply to political activity by all city employees and do not apply to firemen only. We also assume the cities you refer to are third and fourth class cities.

We are enclosing herewith Opinion Letter No. 422 issued by this office on July 20, 1970, to Patrick J. O'Connor regarding the authority of the city of Bridgeton under its city charter to regulate the political activities of city employees. We are also enclosing Opinion No. 45 issued May 1, 1953, to J. Rex James referred to in Opinion Letter No. 422. In Opinion Letter No. 422 we referred to Section 36.150, RSMo, which prohibits employees under the state merit system from participating in certain political activities.

We do not find any statute which prohibits a board of directors of a fire district or the board of aldermen or councilmen of third or fourth class cities from exercising such authority.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosures: Op. Ltr. No. 422
7-20-70, O'Connor

Op. No. 45
5-1-53, James

February 14, 1974

OPINION LETTER NO. 64
Answer by letter-Bird

Honorable Charles M. LeCompte
Prosecuting Attorney
Greene County
Room 206, Courthouse
Springfield, Missouri 65802



Dear Mr. LeCompte:

This letter is in response to your request:

"Under RSMo 129.075, can a bank legally contribute corporate money to a committee to conduct a campaign in opposition to or in support of a city sales tax?"

As pertinent here, Section 129.070, RSMo 1969, provides:

"It shall not be lawful for any corporation organized and doing business under and by virtue of the laws of this state, to directly or indirectly, by or through any of its officers or agents, or by or through any person or persons for them, influence or attempt to influence the result of any election to be held in this state, . . . or by subscribing any money to any campaign fund of any party or person, . . . or to use or offer to use any power, effort, influence or other means whatsoever, to induce or persuade any employee or other person entitled to register before or vote at any election, to vote or refrain from voting for any candidate or on any question to be determined or at issue at any election. . . ."

Honorable Charles M. LeCompte

Section 129.075, RSMo 1969, provides:

"Notwithstanding the provisions of Chapter 129 prohibiting corporations from participating in political actions and in contributing to candidates, it shall not be unlawful for such corporation to participate in any campaign in connection with a change in any law directly affecting such corporation." (Emphasis added)

The central issue posed by your opinion request is whether the city sales tax directly affects a bank. Section 94.510.2, RSMo 1969, provides:

"The sales tax may be imposed at a rate of one-half of one percent or at one percent on the receipts from the sale at retail of all tangible personal property or taxable services at retail within any city adopting such tax, if such property and services are subject to taxation by the state of Missouri under the provisions of sections 144.010 to 144.510, RSMo."

No tax upon any banking service is imposed by Sections 144.010 through 144.510 inclusive. Although it may be urged that a city sales tax has an impact upon the business community which may change the amount of a bank's business, this impact is too speculative to be considered to directly affect a bank. We therefore conclude that a bank has no direct interest in a city sales tax and may not legally contribute corporate money to a committee to conduct a campaign in opposition to or in support of a city sales tax.

Yours very truly,

JOHN C. DANFORTH
Attorney General

MERIT SYSTEM: The Personnel Advisory Board of Missouri
COMPENSATION: has the authority to authorize, by rule,
RULES & REGULATIONS: that appointments under the merit system
may be made at a rate of pay higher than
the minimum for the class depending on bona fide recruitment needs
which may vary according to location.

OPINION NO. 65

January 16, 1974

Mr. Harold E. Cox, Chairman
Personnel Advisory Board
Missouri Personnel Division
117 East Dunklin Street
Jefferson City, Missouri 65101



Dear Mr. Cox:

This opinion is in answer to your request asking:

- "A. Is the following portion of Rule 6.4 (a) of the Rules and Regulations of the Missouri Personnel Advisory Board in conformance with Sections 36.140.1 and 36.140.2 of H. B. #133, 77th General Assembly?

'If the Director finds that the beginning rate of pay for a given class of positions is insufficient to meet the minimum recruitment needs of one or more appointing authorities, either statewide or in selected areas of the State, he may approve the general appointment of employees in such class at a higher rate of pay subject to the following conditions:

- (1) the new appointment rate of pay shall apply to all positions in the class and area involved;
. . . '

- "B. As long as a uniform minimum and maximum rate of pay applies to each class of positions, does H. B. #133, 77th General Assembly, prohibit appointment in a given

Mr. Harold E. Cox

area at a higher rate within the range of pay rates than is used for appointment in other areas, providing that this practice conforms to the requirements of Rule 6.4 (a)?"

Subsection (a) of Rule 6.4 of the Personnel Advisory Board, to which you refer, provides in full:

"ADMINISTRATION OF PAY PLAN

- (a) Appointment Rate. The minimum rate of pay for a class shall normally be paid upon appointment to the class. In individual cases when the qualifications of an applicant substantially exceed those normally expected of beginning employees in the class involved, the Director may approve appointment at a rate above the minimum rate, not to exceed that which is being paid to present employees with comparable qualifications. In such cases the appointing authority must submit a written request outlining the special qualifications which justify a higher induction rate and certifying that all higher ranking eligibles on the register have been offered the same rate of pay. If a former employee is re-employed in a class in which he was previously employed, the appointing authority may make an appointment at the same pay step on which the employee had been paid at the termination of his service. If a provisional employee subsequently receives an appointment to a position in the same class after regular certification from a register of eligibles without interruption in his service to the State, he shall be eligible to continue in his original appointment at the same rate of pay he was receiving as a provisional employee, provided that all higher ranking eligibles have been offered the same rate. If the Director finds that the beginning rate of pay for a given class of positions is insufficient to meet the minimum recruitment needs of one or more appointing

Mr. Harold E. Cox

authorities, either statewide or in selected areas of the State, he may approve the general appointment of employees in such class at a higher rate of pay subject to the following conditions:

- (1) the new appointment rate of pay shall apply to all positions in the class and area involved;
- (2) any employees of such class who are being paid a lower rate of pay than the new appointment rate shall be adjusted at least to the new rate; and
- (3) additional adjustments may be approved, as available funds allow, to restore the relative position of employees within the pay range for the class involved." (Emphasis added)

House Bill No. 133, 77th General Assembly, which amended Section 36.140, RSMo 1969, provides:

"1. After consultation with appointing authorities and the state fiscal officers, and after a public hearing, the director shall prepare and recommend to the board a pay plan for all classes subject to this law. The pay plan shall include, for each class of positions, a minimum and a maximum rate, and such intermediate rates as the director considers necessary or equitable. In establishing the rates, the director shall give consideration to the experience in recruiting for positions in the state service, the rates of pay prevailing in the state for the services performed, and for comparable services in public and private employment, living costs, maintenance, or other benefits received by employees, and the financial condition and policies of the state. These considerations shall be made on a statewide basis and shall not make any distinction based on geographical areas or urban and rural conditions. The pay plan shall take effect when approved by the board and the governor, and each

Mr. Harold E. Cox

employee appointed to a position subject hereto after the adoption of the pay plan shall be paid at one of the rates set forth in the pay plan for the class of positions in which he is employed; provided, that the state comptroller certifies that there are funds appropriated and available to pay the adopted pay plan. The pay plan shall also be used as the basis for preparing budget estimates for submission to the legislature insofar as such budget estimates concern payment for services performed in positions subject hereto. Amendments to the pay plan may be recommended by the director from time to time as circumstances require and such amendments shall take effect when approved as provided by this act. The conditions under which employees may be appointed at a rate above the minimum provided for the class, or advance from one rate to another within the rates applicable to their positions, shall be determined by the regulations.

"2. Upon the effective date of this act, the minimum and maximum rate for each class of positions shall be made uniform throughout the state and shall be set at the highest minimum and maximum rate then in effect in this state for that class of positions. Any subsequent change in rates shall be made on a uniform statewide basis. No merit system employee shall receive more or less compensation than another merit system employee solely because of the geographical area in which he lives or works.

"3. No merit system employee shall receive any decrease in compensation due to the provisions of this act." (Emphasis added)

The purpose of the amendments to Section 36.140 was to eliminate the pay differential which existed between the metropolitan and so-called nonmetropolitan areas and thus provide for statewide uniformity in pay ranges.

The amendment, above, retained the language, last sentence of subsection 1:

Mr. Harold E. Cox

" . . . The conditions under which employees may be appointed at a rate above the minimum provided for the class, or advance from one rate to another within the rates applicable to their positions, shall be determined by the [Personnel Board] regulations."

Two of the primary reasons in the past for hiring at a range higher than the classification minimum have been because of the unusual qualifications of the applicant and because, as you indicate, of the necessity to meet the competitive rate in any location, whether metropolitan or nonmetropolitan, for the type of services sought.

In making such amendments to Section 36.140, the legislature eliminated the consideration of local prevailing rates of pay in setting the classification range by expressly providing that the Board consider, among other things, "the rates of pay prevailing in the state for the services performed." The legislature also emphatically directed that the ". . . considerations shall be made on a statewide basis and shall not make any distinction based on geographical areas or urban and rural conditions. . . ." The conditions referred to under such provisions however relate to the establishing of the pay ranges and not to the hiring within such ranges. In this latter respect the legislature retained the previous statutory language, as we have noted above, authorizing the Board to determine, by regulation, the conditions under which employees may be appointed at a rate above the minimum for the class. Presumably, as no change was made in this provision, the legislature approved the existing practice and procedure of the Board under Rule 6.4 in inducting at such beginning rates, or steps, within the job classifications as is necessary to meet bona fide local recruitment needs. Notably, the variation due to recruitment needs would not affect the established class minimum or maximum which would remain uniform throughout the state and would not distinguish between urban and rural areas. Any induction pay variations will be based on actual recruitment requirements thus permitting the flexibility required in hiring for a particular position at any location.

A further indication of legislative intent is found in the provision added in subsection 2 of Section 36.140 which states that ". . . No merit system employee shall receive more or less compensation than another merit system employee solely because of the geographical area in which he lives or works." In our view differentials based on actual position recruitment needs are not based solely on a geographical area.

Mr. Harold E. Cox

Of course, it should be borne in mind that at a certain point the Board will have to determine the effect of changes in the prevailing rates of pay on a statewide basis and redetermine the minimum and maximum pay for such class or classes under subsection 1 of amended Section 36.140.

CONCLUSION

It is the opinion of this office that the Personnel Advisory Board of Missouri has the authority to authorize, by rule, that appointments under the merit system may be made at a rate of pay higher than the minimum for the class depending on bona fide recruitment needs which may vary according to location.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

February 1, 1974

OPINION LETTER NO. 66
Answer by letter-Vodra

Honorable Sue S. Shear
Representative, District 76
%House Post Office, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Shear:

This letter is in response to your request for a ruling on the following question:

"Missouri school law 163.017 states that 'average daily attendance' shall be obtained by dividing one half the total number of days attended by resident kindergarten pupils whose fifth birthday before the first of October after the first day of the school term, by the actual number of days that the school was in session not including legal school holidays and legally authorized teachers' meetings.

"Does this law unfairly discriminate against those children who, because of exceptional abilities, qualify for early admission to kindergarten, but are denied state aid because their fifth birthday's fall after October first?"

You have also furnished us with the factual situation giving rise to this request, set forth below:

A child has qualified for early admission to a University City school kindergarten. Because her birthday (fifth) falls on October 8, she does not qualify for state aid and the

Honorable Sue S. Shear

parents must pay \$602.00 tuition. Because she is a gifted child, the state is paying for only twelve of her thirteen years of schooling.

In our Opinion No. 394A, Moore, September 25, 1970, we ruled that a school district has the authority to admit a child to kindergarten even though the child will not reach his fifth birthday prior to the October first next following the start of school. However, under Section 163.017, RSMo Supp. 1971, the school district is not eligible for state aid for any such underage pupil. In order to pay for the schooling of the underage pupil, the district has imposed a tuition charge on the parents. You ask if this charge is illegal because it discriminates against gifted children in contravention of the equal protection clause of the United States Constitution.

The application of the equal protection clause to public education was recently considered at length by the United States Supreme Court in San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278, 1295-1300, 36 L.Ed.2d 16 (1973), the so-called school finance case. Concerning this problem, the court concluded that education as such is not a constitutionally guaranteed right meriting special protection and actions by a state to assist public education are not to be criticized merely because the state might have gone further than it did. Rather, educational classifications related to spending levels are valid so long as they bear a rational relationship to a legitimate state purpose.

To evaluate properly the legality of the action you question, we first note that the tuition charge arose because the school district gave a special opportunity--early enrollment--to the child involved. If the parents had chosen to turn down the offer, the child could still have enrolled at age five and would have received the standard number of tuition-free years. The choice was up to the parents, and we believe that the program is consistent with the standards set out in Rodriguez.

As a matter of law, gifted students do not have a constitutional right to a different education than average pupils. The state or a school district may choose to establish a program for three or four-year-olds, and they may set up such a program for all students or for only those who need it most. However, to what extent a school district or the state chooses to expand on the minimum in such a fashion is a political, not a constitutional, decision. Rodriguez, supra.

Honorable Sue S. Shear

In Missouri, the state has provided free schools for all pupils between the ages of six and twenty and for all handicapped children between the ages of five and twenty; in addition, individual districts may offer free education to all pupils between five and six, and to handicapped children ages three and four, and the districts will receive aid from the state if they do so. Sections 160.051, 162.700, 162.975, and 163.017, V.A.M.S. The student you inquire about was not charged tuition because she was gifted, but merely because she was a nonhandicapped child who was only four on October first of the year she started kindergarten. The decision to provide free education only within certain ages is one which we believe the state is entitled to make.

It is, therefore, our view that the provisions of Section 163.017, RSMo Supp. 1971, limiting state aid for kindergarten students to those who are five years old on the October first next following the beginning of the school term are constitutional and do not improperly discriminate against gifted children.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 394A
9-25-70, Moore



OFFICES OF THE

JOHN C. DANFORTH
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

March 27, 1974

OPINION LETTER NO. 67

Honorable Robert Fowler
State Representative, District 69
c/o House Post Office
State Capitol Building
Jefferson City, Missouri 65101

Dear Representative Fowler:

This opinion letter is in response to your request for a ruling on the "legality of a co-operative parking agreement between a government agency or Junior College District and a private facility."

Your request was prompted by the agreement between the Junior College District of St. Louis and St. Louis County (hereafter the District) and the St. Louis Arena (hereafter the Arena). We have been furnished copies of the agreement by counsel for the two bodies.

The agreement was originally drafted in 1964 and it has since been amended several times. Currently, the agreement provides that during the day and on most week nights, persons attending classes or other events at Forest Park Community College (hereafter the College) may park in certain designated areas owned by the Arena; during weekend hours and on some week nights, Arena patrons may park in some of the College lots. The Arena must notify the College before using the College lots, and the College has the right to refuse to permit such a use if the College needs the spaces during the period requested. In addition to sharing in this reciprocal use of parking facilities, the District receives sixty cents for each car parked in College lots pursuant to this agreement. This agreement, according to counsel for the District, "was an integral part of the transaction (in which the District

Honorable Robert Fowler

acquired the land on which the College is now located) and we could not have purchased the property except through condemnation without such an Agreement."

A school district, including a junior college district, has the authority to contract with a private body for the operation of a common service, provided that the subject of the contract is within the scope of the powers of the school district. Section 70.220, RSMo 1969. The operation of a parking lot or garage may today be considered to be a necessary part of any higher education facility. State ex rel. Curators of the University of Missouri v. Neill, 397 S.W.2d 666 (Mo. Banc 1966). Therefore, the subject matter of this contract is authorized by statute, and we conclude that the District may enter into a reciprocal parking agreement with the Arena. It should be noted that we have not examined the contract beyond the question asked, and this opinion should not be construed as dealing with the propriety of any other features of this contract.

Very truly yours,

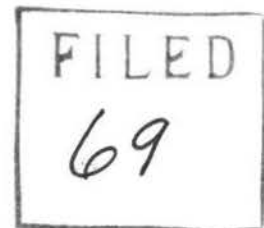
A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

February 11, 1974

OPINION LETTER NO. 69
Answer by Letter - Boicourt

Honorable Larry R. Marshall
Missouri Senate, 19th District
Room 319, State Capitol Building
Jefferson City, Missouri 65101



Dear Senator Marshall:

This letter is in response to your official request for an opinion by the Office of the Attorney General in which you inquired whether the City of Ashland, Missouri, is empowered to make appropriations to the Ashland Day Care Center. To further assist us in preparing this opinion, you have provided the following information. The Ashland Day Care Center is a not-for-profit corporation organized pursuant to Chapter 355, RSMo 1969, and operated by the parents using the facility. Because of the current lack of funding by the federal Office of Economic Opportunity for programs like the Ashland Day Care Center, the Center has requested the City of Ashland to appropriate funds initially accruing to the city by reason of the Federal Revenue Sharing Program. The city has refused to do so relying on Article VI, Section 25, Constitution of Missouri.

The constitutional provision provides that:

"No county, city or other political corporation or subdivision of the state shall be authorized to lend its credit or grant public money or property to any private individual, association or corporation except as provided in Article VI, Section 23(a) and except that the general assembly may authorize any county, city or other political corporation or subdivision to provide for

Honorable Larry R. Marshall

the retirement or pensioning of its officers and employees and the widows and children of deceased officers and employees and may also authorize payments from any public funds into a fund or funds for paying benefits upon retirement, disability or death to persons employed and paid out of any public fund for educational services and to their beneficiaries or estates; and except, also, that any county of the first class is authorized to provide for the creation and establishment of death benefits, pension and retirement plans for all its salaried employees, and the widows and minor children of such deceased employees."

None of the exceptions provided for in the above-quoted constitutional provision applies to the facts presented in your opinion request.

Therefore, Article VI, Section 25, Constitution of Missouri, prohibits the appropriation of public monies to the corporation. Ruggeri v. City of St. Louis, 429 S.W.2d 765, 769 (Mo. 1968); and Attorney General's Opinion No. 75, Riley, February 29, 1952, (copy enclosed). To like effect is Article VI, Section 23, Constitution of Missouri (1945), which specifically prohibits the use of public funds to aid private corporations by the following language:

"No county, city or other political corporation or subdivision of the state shall own or subscribe for stock in any corporation or association, or lend its credit or grant public money or thing of value [emphasis ours] to or in aid of any corporation, association or individual, except as provided in this Constitution." (Emphasis theirs).

The fact that the origin of monies which could be granted by the City of Ashland to the Ashland Day Care Center might be from the Federal Revenue Sharing Program does not alter our conclusion. Section 123(a) (4) of Public Law 92-512, the State and Local Fiscal Assistance Act of 1972, provides that a local unit of government, in order to qualify for the receipt of revenue sharing funds, must satisfy the Secretary of the Treasury that

Honorable Larry R. Marshall

"it will provide for the expenditure of amounts received under subtitle A only in accordance with the laws and procedures applicable to the expenditure of its own revenues. . . ."

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 75
2-29-52, Riley



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

March 25, 1974

JOHN C. DANFORTH
ATTORNEY GENERAL

OPINION LETTER NO. 71

Honorable Christopher S. Bond
Governor of Missouri
Executive Office
State Capitol Building
Jefferson City, Missouri 65101

Dear Governor Bond:

This letter is in response to your request for my opinion on the question of what agency is responsible for the management and possible disposition of the St. Louis Armory property.

The City of St. Louis, pursuant to ordinance, conveyed this property by quitclaim deed and for the sum of one dollar to the state of Missouri on March 15, 1962. The deed and accompanying agreement contained no requirement that the state use this property for any particular purpose, although the ordinance and the agreement recited that the property was to be transferred to the Adjutant General in behalf of the state of Missouri. The Missouri National Guard did thereafter use and occupy the St. Louis Armory and we therefore deem the following statute applicable:

"[The Adjutant General] shall have control of all armories that are owned, erected, purchased, leased or provided by the state. The adjutant general, in the name of the state of Missouri, may acquire by purchase and may receive by donation or dedication any property which may be used for military purposes. For the control and management of armories described in this section, the adjutant general may establish armory boards, the personnel of which shall serve without pay. Such boards, subject to the direction

Honorable Christopher S. Bond

of the adjutant general, shall control, manage and supervise all activities in such armories and may rent such armories to persons or organizations not connected with the organized militia." (Section 41.160, subsection 13, RSMo)

We are aware that the Adjutant General advised the Governor on November 21, 1971, that the Missouri National Guard had completely vacated the St. Louis Armory and that all units of the guard formerly occupying it had relocated to the Jefferson Barracks facility in St. Louis County. We understand that the Governor thereafter directed the Division of Planning and Construction to control and manage the St. Louis Armory and that this arrangement has continued to the present. The division has made the armory available to local groups for recreational purposes.

The Omnibus State Reorganization Act of 1974, Senate Bill No. 1, 77th General Assembly, effective May 2, 1974, includes the following provisions:

"7. The commissioner of administration shall examine the space needs of the reconstituted agencies of state government and space available and shall with the approval of the board of public buildings assign and reassign space in property owned, leased or otherwise controlled by the state.

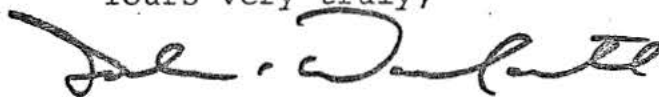
* * *

"10. The fee title to all real property now owned or hereafter acquired by the state of Missouri, or any department, division, commission, board or agency of state government, other than real property owned or possessed by the state highway commission, conservation commission, state park board, and the university of Missouri, shall on the effective date of this act vest in the governor. The governor may not convey or otherwise transfer the title to or other interest in such real property, unless such conveyance or transfer is first authorized by an act of the general assembly. The commissioner of administration shall prepare management plans for such properties in the manner set out in subparagraph 7 above."

Honorable Christopher S. Bond

We believe the future control, management, and disposition of the St. Louis Armory should be governed by the above-statutory provisions.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

May 6, 1974

OPINION LETTER NO. 72

Honorable Wesley A. Miller
Representative, District 121
801 East First Street
Washington, Missouri 63090

Dear Representative Miller:

This letter is written in response to your request for an official Attorney General's opinion concerning the following question:

"What types of buildings in Missouri require building plans and specifications to be prepared by registered architects or engineers?"

Section 327.091, RSMo 1969, defines the practice of architecture as follows:

"Any person practices architecture in Missouri who renders or offers to render or represents himself as willing or able to render service or creative work which requires architectural education, training and experience, including services and work such as consultation, evaluation, planning, aesthetic and structural design, the preparation of drawings, specifications and related documents, and the coordination of services furnished by structural, civil, mechanical and electrical engineers and other consultants as they relate to architectural work in connection with the construction or erection of any private or public building, building structure, building project or integral part or parts of buildings or of any additions or alterations thereto."

Honorable Wesley A. Miller

Section 327.101, RSMo 1969, prohibiting the unauthorized practice of architecture provides as follows:

"No person shall practice architecture in Missouri as defined in section 327.091 unless and until the board has issued to him a certificate of registration or a certificate of authority certifying that he has been duly registered as an architect or authorized to practice architecture, in Missouri, and unless such certificate has been renewed each year as hereinafter specified; provided, however, that nothing in this chapter shall apply to the following persons:

(1) Any person who is an employee of a person holding a currently valid certificate of registration as an architect or who is an employee of any person holding a currently valid certificate of authority under this chapter, and who performs architectural work under the direction and continuing supervision of and is checked by one holding a currently valid certificate of registration as an architect under this chapter;

(2) Any person who is a regular full-time employee who performs architectural work for his employer if and only if all such work and service so performed is in connection with a facility owned or wholly operated by the employer and which is occupied by the employer of the employee performing such work or service, and if and only if such work and service so performed do not endanger the public health or safety;

(3) Any holder of a currently valid certificate as a registered professional engineer who performs only such architectural work as is incidental and necessary to the completion of engineering work lawfully being performed by such registered professional engineer;

(4) Any person who is a landscape architect, city planner or regional planner who performs work consisting only of consultations concerning and preparation of master plans for

Honorable Wesley A. Miller

parks, land areas or communities, or the preparation of plans for and the supervision of the planting and grading or the construction of walks and paving for parks or land areas and such other minor structural features as fences, steps, walls, small decorative pools and other construction not involving structural design or stability and which is usually and customarily included within the area of work of a landscape architect or planner;

(5) Any person who renders architectural services in connection with the construction, remodeling or repairing of any privately owned building described in paragraphs (a), (b), (c), (d), and (e) which follow, and who indicates on any drawings, specifications, estimates, reports or other documents furnished in connection with such services that he is not a registered architect:

(a) A dwelling house; or

(b) A multiple family dwelling house, flat or apartment containing not more than two families; or

(c) A commercial or industrial building or structure which provides for the employment, assembly, housing, sleeping or eating of not more than nine persons; or

(d) Any one structure containing less than twenty thousand cubic feet, except as provided in (b) and (c) above, and which is not a part or a portion of a project which contains more than one structure; or

(e) A building or structure used exclusively for farm purposes."

Generally, Section 327.101 prohibits an individual from engaging in the practice of architecture as above defined unless said individual has been duly registered as an architect by the Missouri State Board of Architects, Professional Engineers and Land Surveyors. This statutory section does, however, provide for certain exceptions to the general rule that one must be licensed as an architect before he practices architecture. As related to your question, for example, a person registered by the

Honorable Wesley A. Miller

Board of Architects, Professional Engineers and Land Surveyors as a professional engineer may practice architecture when he ". . . performs only such architectural work as is incidental and necessary to the completion of engineering work lawfully being performed by such registered professional engineer;" Section 327.101(3), RSMo. Section 327.101(5), RSMo, further excepts from registration as an architect those persons who perform architectural services in connection with the following designated privately owned buildings:

"(a) A dwelling house; or

(b) A multiple family dwelling house, flat or apartment containing not more than two families; or

(c) A commercial or industrial building or structure which provides for the employment, assembly, housing, sleeping or eating of not more than nine persons; or

(d) Any one structure containing less than twenty thousand cubic feet, except as provided in (b) and (c) above, and which is not a part or a portion of a project which contains more than one structure; or

(e) A building or structure used exclusively for farm purposes."

Architectural services in regard to the above-specified types of buildings can be performed by one not registered as an architect only if the individual concerned affirmatively indicates ". . . on any drawings, specifications, estimates, reports or other documents furnished in connection with such services that he is not a registered architect: . . ."

Section 327.111, RSMo 1969, provides as follows:

"Any person who practices architecture in Missouri as defined in section 327.091, who is not exempt under the proviso of section 327.101, or who is not the holder of a currently valid certificate of registration to practice architecture in Missouri, or who pretends or attempts to use as his own the certificate of registration or the seal of another architect or who affixes his or another registered architect's seal on any plans, specifications,

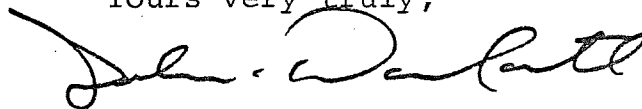
Honorable Wesley A. Miller

drawings, or reports which have not been prepared by him or under his immediate personal supervision, is guilty of a misdemeanor, and upon conviction thereof shall be punished therefor by confinement in the county jail for a period of not less than six nor more than twelve months or by a fine of not less than five hundred dollars nor more than fifteen hundred dollars, or by both such fine and confinement."

In relation to the question you have posed, therefore, the practice of architecture, as defined by Section 327.091, can lawfully be performed only by an individual licensed as an architect by the Board of Architects, Professional Engineers and Land Surveyors, except that a licensed professional engineer may engage in the practice of architecture incidental to lawfully performed engineering work, and except that a person not licensed as an architect by the state of Missouri may render architectural services in regard to the types of buildings specifically enumerated by Section 327.101(5), RSMo.

We have answered only the precise question you asked, and we do not rule on the question whether building permits could or should be denied if building plans are prepared by persons other than persons duly registered as architects or authorized to practice architecture in Missouri.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", with a stylized, flowing script.

JOHN C. DANFORTH
Attorney General

January 15, 1974

OPINION LETTER NO. 74
Answer by letter-Wieler

Honorable Charles J. Becker
Representative, District 123
& House Post Office, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Becker:

This is in response to your request for an opinion as to whether or not a third class city can exempt churches and other not-for-profit organizations from the gross receipts tax imposed upon utilities furnishing services to the citizens of the city.

The statutory powers of third class cities with respect to taxation are contained in Sections 94.010 to 94.180, RSMo 1969. Presumably, the gross receipts tax mentioned in your opinion request is a license tax on public utilities enacted pursuant to Section 94.110, RSMo 1969. This tax imposed upon public utilities for the privilege of doing business within the city is in turn passed on to the consumers pursuant to a tariff approved by the Public Service Commission under the provisions of Chapter 386, RSMo. Inasmuch as the tax in question is levied against the utilities, not their individual customers, we fail to see how a city could exempt organizations from a tax which has not been levied upon them directly.

In any event, the power of a third class city to exempt from taxation has been limited by Section 94.050, RSMo 1969. This section provides:

"The city council shall have no power to relieve any person from the payment of any tax, or exempt any person from any burden imposed by law."

Honorable Charles J. Becker

In the absence of any language to the contrary, the definition of the term "person" in statutes of this state must be given a broad meaning. Section 1.020(7), RSMo 1969, provides as follows:

"As used in the statutory laws of this state, unless otherwise specially provided or unless plainly repugnant to the intent of the legislature or to the context thereof:

* * *

(7) The word 'person' may extend and be applied to bodies politic and corporate, and to partnerships and other unincorporated associations;"

Accordingly, it is our opinion that Section 94.050, RSMo 1969, would prevent a third class city from relieving churches or other not-for-profit organizations from the payment of any tax. This would be especially true when the tax is not a tax levied directly against the churches or other not-for-profit organizations, but rather is a license tax levied against a public utility, the cost of which is borne by the utility's customers in the form of tariffs approved by the Public Service Commission.

We are enclosing a copy of Opinion Letter No. 122 rendered March 12, 1962, to Charles D. Trigg as to the liability of the state to pay the cost of utility service.

Yours very truly,

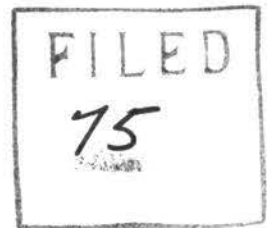
JOHN C. DANFORTH
Attorney General

Enclosure: Op. Ltr. No. 122
3-12-62, Trigg

February 19, 1974

OPINION LETTER NO. 75
Answer by letter- Mansur

Honorable Jack Gallego
Prosecuting Attorney
Lincoln County
Troy Building
Troy, Missouri 63379



Dear Mr. Gallego:

This is in reply to your letter in which you inquire who bears the cost, the petitioners or the county, of an election to establish an ambulance district under Senate Bill No. 108, Chapter 190, RSMo Supp. 1971.

We are enclosing herewith Opinion Letter No. 416 issued by this office on October 17, 1963, in which we stated the county was responsible for the cost of an election to establish a nursing home district under Chapter 198, RSMo. The provisions of the statutes requiring an election to establish an ambulance district and a nursing home district are similar and in our opinion the same conclusion should be applied.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. Ltr. No. 416
10-17-63, Knudsen



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

January 7, 1974

JOHN C. DANFORTH
ATTORNEY GENERAL

OPINION LETTER NO. 77

Mr. George M. Camp, Director
Missouri Department of Corrections
State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Camp:

This letter is in answer to your question asking:

"1. To what extent may the Director, on behalf of the Missouri Department of Corrections, State of Missouri solicit and/or negotiate involvement of public and private enterprise, corporate or otherwise, in the Departmental Mission?

e.g. A. May the Director lease all or part of the industrial facilities of the Department to a corporation pursuant to an agreement to:

- 1) Employ inmates at prevailing wage;
- 2) Institute an employee stock investment trust with vesting benefits to inmate employees;
- 3) Provide custodial supervision services (obligation on the Department).

e.g. B. May the Director negotiate with such an entity for payment to the State for room and board and other work related

Mr. George M. Camp

expenses or require the same as a condition precedent to participation in such a lease-labor agreement?

"2. If such a lease and agreement arrangement is authorized by Missouri statutes, would the marketing policies of the independent corporation be subject to the restrictions of Section 216.505, RSMo 1969?

"3. If such a lease and agreement arrangement is authorized, could the Department of Corrections agree to sell to the private corporation all inventories of completed goods, goods in process and raw materials on hand at the effective date of the lease agreement?"

You also state that:

"Various provisions of Chapter 216, RSMo 1969, indicate that emphasis should be given in Department of Corrections' programs to rehabilitating inmates and returning them to society with the capacity to be useful citizens. Under the present prison industries program an inmate receives a nominal wage as an incentive to assert himself in work assignments within the Division of Prison Industries. A program is now being considered through which inmate employees would receive a normal wage for their labor and a vesting share of ownership in the business through the establishment of an employee stock investment trust program. It is hoped that such a system would provide the motivation necessary to interest inmate employees in their assignments, thus developing the work habit and the experiences of success which are necessary to rehabilitation.

"The statement of the Departmental Mission is: The Mission of the Missouri Department of Corrections is to improve public safety by returning prior offenders to society as successful and productive citizens."

In answer to your first question, our examination of the provisions of Chapter 216, RSMo, relative to correctional institutions

Mr. George M. Camp


and in particular Section 216.475, RSMo et seq., relative to the Division of Prison Industries leads us to the conclusion that the Department of Corrections does not have the authority to enter into such an agreement.

The attitude of the General Assembly with respect to such labor and prison labor products is best exemplified by Section 216.505, RSMo, which provides:

"It shall be the policy of the state and of the division of prison industries to serve only the potential state and political subdivisions use market, and open market sales shall be discontinued as soon as possible, but in no event shall open market sales be made except in case of excess production and at prevailing market prices for goods of like quality and kind."

Thus, in the absence of express statutory authorization to enter into such arrangements and in light of the clear expression of legislative policy as indicated by the above section which leaves no room for argument respecting legislative intent, it is our view that the department does not have authority to make such agreements with private enterprise.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

TAXATION (CITY SALES): A city may place restrictions upon the use of proceeds from a city sales tax by an ordinance which is referred to a vote of the people, but such restrictions may be altered by the governing body of the city, after the ordinance has been adopted, without a subsequent vote of the people.

OPINION NO. 79

January 16, 1974

Honorable Clifford B. Mayberry
Prosecuting Attorney, Adair County
I.O.O.F. Building
123 1/2 North Elson
Kirksville, Missouri 63501



Dear Mr. Mayberry:

This official opinion is issued in response to your request for a ruling on the following question:

"Can a City place restrictions upon the use of proceeds from a City sales tax, said restrictions being shown upon the ballot by which said sales tax is submitted to the people, which will be binding upon the City Government until and unless the matter is resubmitted to the people at a subsequent time."

The question arises from the following factual situation, as stated in your request:

"The City of Kirksville, Missouri has introduced an ordinance to submit to the people of Kirksville the issue of a City sales tax wherein the ballot will contain a restriction limiting the use of the sales tax to city street and storm sewer improvements. It is the City's desire to make this binding upon future city administrations."

You have not furnished us with a copy of the proposed ballot.

Your question is twofold in nature. We must determine, first, whether a city may restrict the proceeds of its city sales tax

Honorable Clifford B. Mayberry

to certain uses such as city street and storm sewer improvements, and, secondly, if such restrictions are enacted by an ordinance referred to a vote of the people, whether such restrictions may be amended without a subsequent vote of the people.

The City of Kirksville is a third class city. There appears to be no restriction on the power of a third class city to devote the proceeds of its city sales tax, enacted pursuant to Sections 94.500 to 94.570, RSMo 1969, to city street and storm sewer improvements. Section 94.510(1), in pertinent part, provides as follows:

"Any city may, by a majority vote of its council or governing body, impose a city sales tax for the benefit of such city in accordance with the provisions of sections 94.500 to 94.570; . . ." (Emphasis added)

Inasmuch as street and storm sewer improvements would clearly be for the benefit of the city, Section 94.510 would not prohibit such use of the proceeds of the city sales tax.

However, we do not believe that such a provision can be enacted in a manner which will make it binding upon future city administrations until it is repealed by a vote of the people. In our Opinion No. 39, issued January 3, 1973, to Representative Edna Eads, copy of which is attached hereto, we held that the governing body of a city may abolish a city sales tax previously imposed as provided in Sections 94.500 to 94.570, RSMo 1969, by repealing the ordinance imposing the tax, without a subsequent vote of the qualified electors on the question of abolition. In so holding, we quoted the following statement from the case of In re Condemnation of Property for Park in City of St. Joseph, 263 S.W. 97 (Mo.banc 1924):

". . . [A]n ordinance enacted under the initiative [Section 7950, RSMo 1919] must be proposed by the people and adopted by them. Such an ordinance cannot be repealed or amended, except by a vote of the people.

"There is an absence of this limitation in Section 7951 regulating the submission of ordinances to the people for their approval or rejection which have been enacted by the council. . . . Having been enacted and approved, it [an ordinance] is nevertheless

Honorable Clifford B. Mayberry

equally subject to the legislative will as to amendment or repeal as though it had not been referred. . . . Legislative action concerning a referred statute, whether it be state or municipal, is held in abeyance only until after it has been approved or rejected by the people. . . ." (Emphasis added)

From this statement of the principles governing ordinances which have been adopted by referendum, we conclude that the governing body of a city which has adopted such a city sales tax ordinance may amend that ordinance without submitting such amendment to a vote of the people. Moreover, such amendment could alter the prescribed use to which the proceeds of the city sales tax are devoted.

CONCLUSION

Therefore, it is the opinion of this office that a city may place restrictions upon the use of proceeds from a city sales tax by an ordinance which is referred to a vote of the people, but that such restrictions may be altered by the governing body of the city, after the ordinance has been adopted, without a subsequent vote of the people.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mark D. Mittleman.

Very truly yours,



JOHN C. DANFORTH
Attorney General

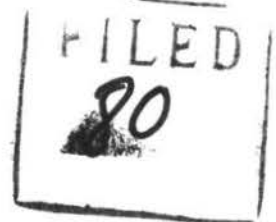
Enclosure: Op. No. 39
1-3-73, Eads

PROBATION AND PAROLE: The Board of Probation and Parole may properly refuse to allow its clients to live in meretricious relationships during the term of their probation or parole and may likewise require that parolees or probationers sent to Missouri under the terms of the Interstate Compact for Supervision of Parolees and Probationers not live in such relationships.

OPINION NO. 80

May 2, 1974

Mr. W. R. Vermillion, Chairman
Board of Probation and Parole
Post Office Box 267
Jefferson City, Missouri 65101



Dear Mr. Vermillion:

This is in reply to your request for this office's opinion concerning the Board of Probation and Parole's right to refuse to allow their clients to live in a common-law relationship. In that request you ask:

"Is the Missouri Board of Probation and Parole correct in refusing to allow its probationers and parolees, or those persons sentenced in other states and supervised in Missouri under the terms of the Interstate Compact for the Supervision of Parolees and Probationers, to live in a common-law relationship. There apparently is no statute which expressly forbids such common-law relationship. Therefore, our question involves only the Board's right to refuse their clients to live in such a relationship."

In your opinion request you state that there is no specific condition of probation or parole forbidding a client from living in a common-law relationship. However, Condition No. 8 as recited in the Order of Probation (MBPP-151), Order of Parole (MBPP-151-J) and Order of Release on Parole (MBPP-206) provides "I shall report regularly, as directed, to my Probation and Parole Officer, and I agree to follow and abide by any directives given me by my Probation and Parole Officer." In the booklet entitled "Rules and Regulations Governing the Conditions of Probation and Parole," the probationer or parolee is advised: "Obviously, you are not to live in a common law relationship, since such is not legal in the State of Missouri."

Mr. W. R. Vermillion

You state that the Board presently will not approve a parole plan which includes living in a meretricious relationship for either Missouri parolees and probationers or for those persons sentenced in other states and supervised in Missouri. Your question is whether the Board has the right to insist that probationers and parolees under its supervision not live in common-law relationships.

It is our understanding that by the term "common-law relationship" you mean to include all common-law marriages contracted as well as meretricious liaisons. Common-law marriages contracted in Missouri after June 19, 1921, are void under the provisions of Section 451.040, RSMo. Because the issues regarding the validity of common-law marriages are very complex and dependent upon the facts of a particular case, we limit this opinion to consideration of the Board's right to refuse to allow probationers and parolees under its supervision to live in meretricious relationships. This opinion does not consider whether the Board may prohibit its clients from cohabiting with a common-law spouse if the marriage was lawfully contracted in a state other than Missouri or where the marriage was contracted in Missouri prior to June 19, 1921.

The Board of Probation and Parole derives its authority to impose conditions of parole and probation and rules and regulations concerning conditions of parole and probation from the statutes which follow:

Section 549.251, subsection 1, RSMo 1969:

"The board may adopt general rules and regulations concerning the conditions of probation applicable to cases in the courts for which it provides probation service. Nothing herein, however, shall limit the authority of the court to impose or modify any general or specific conditions of probation."

Section 549.261, subsection 4, RSMo 1969:

"The board may adopt such other rules not inconsistent with law as it may deem proper or necessary, with respect to the eligibility of prisoners for parole, the conduct of parole hearings or conditions to be imposed upon parolees. Whenever an order for parole is issued it shall recite the conditions thereof."

The United States Supreme Court in Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), recognized that

Mr. W. R. Vermillion

parole is subject to certain conditions. In that opinion, the Court stated at 408 U.S. 478:

"To accomplish the purpose of parole, those who are allowed to leave prison early are subjected to specified conditions for the duration of their terms. These conditions restrict their activities substantially beyond the ordinary restrictions imposed by law on an individual citizen. Typically, parolees are forbidden to use liquor or to have associations or correspondence with certain categories of undesirable persons. Typically, also they must seek permission from their parole officers before engaging in specified activities, such as changing employment or living quarters, marrying, acquiring or operating a motor vehicle, traveling outside the community, and incurring substantial indebtedness. Additionally, parolees must regularly report to the parole officer to whom they are assigned and sometimes they must make periodic written reports of their activities. . . ."

The justification for restricting a parolee's or probationer's right to determine how he will conduct his daily affairs may be found in the fact of his criminal conviction. Regarding that issue, the United States Supreme Court in Morrissey v. Brewer, 408 U.S. at 483 stated:

". . . The State has found the parolee guilty of a crime against the people. That finding justifies imposing extensive restrictions on the individual's liberty. . . ."

The Missouri Supreme Court touched on the same issue in State v. Brantley, 353 S.W.2d 793 (Mo. 1962). The court stated at loc. cit. 796:

"The liberty given to a person on conditional probation, parole, or pardon is subject to all conditions attached to his release which are not illegal, immoral or impossible of performance. . . ."

Since the policy of the Board regarding meretricious relationships is neither illegal, immoral, nor impossible of performance, we conclude that by reason of Section 549.251, subsection

Mr. W. R. Vermillion

1 and Section 549.241, subsection 4, RSMo 1969, as well as the cases of Morrissey v. Brewer, supra and State v. Brantley, supra, the Board may refuse to approve a parole plan which includes such a relationship with respect to Missouri probationers and parolees.

The relevant statute providing for supervision of out-of-state parolees and probationers is Section 549.310, RSMo 1969, which states:

"The governor is hereby authorized and directed to enter into a compact on behalf of the state of Missouri with the commonwealth of Puerto Rico, the Virgin Islands, the District of Columbia and any and all other states of the United States legally joining therein and pursuant to the provisions of an act of the Congress of the United States of America granting the consent of congress to the commonwealth of Puerto Rico, the Virgin Islands, the District of Columbia and any two or more states to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and for other purposes, which compact shall have as its objective the permitting of persons placed on probation or released on parole to reside in any other state signatory to the compact assuming the duties of visitation and supervision over such probationers and parolees; permitting the extradition and transportation without interference of prisoners, being retaken, through any and all states signatory to said compact under such terms, conditions, rules and regulations, and for such duration as in the opinion of the governor of this state shall be necessary and proper." [Emphasis added].

Pursuant to Section 549.310, quoted above, the state of Missouri signed the Interstate Compact for Supervision of Parolees and Probationers on April 3, 1947. Section 1(2) of that Compact provides:

"That each receiving state will assume the duties of visitation of and supervision over probationers or parolees of any sending state and in the exercise of those duties will be governed by the same standards that prevail for its own probationers and parolees." [Emphasis added].

Mr. W. R. Vermillion

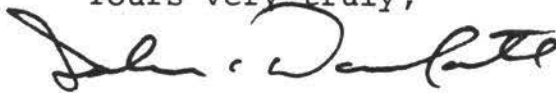
In addition, the probationer or parolee must sign an "Agreement to Return" wherein he or she agrees to abide by the conditions of parole as fixed by both the sending and the receiving states. See, Parole and Probation Compact Form III. Since the Board refuses to permit its own probationers and parolees to live in meretricious relationships, we would conclude that by reason of Section 1(2) of the above-quoted Compact, the Board may also refuse to allow probationers and parolees sent from other signatory states for supervision in Missouri to live in such relationships.

CONCLUSION

It is, therefore, the conclusion of this office that the Board of Probation and Parole may properly refuse to allow its clients to live in meretricious relationships during the term of their probation or parole and may likewise require that parolees or probationers sent to Missouri under the terms of the Interstate Compact for Supervision of Parolees and Probationers not live in such relationships.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Ellen S. Roper.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General



OFFICES OF THE

JOHN C. DANFORTH
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

May 6, 1974

OPINION LETTER NO. 82

Honorable Don Hancock
State Representative, District 153
906 Lafayette
Doniphan, Missouri 63935

Dear Representative Hancock:

This letter is to acknowledge receipt of your request for an opinion from this office which provides in part as follows:

"May a teacher be reinstated under the Teacher and School Retirement Systems when said teacher retired at age 58 (with 40 years service) in 1966 and reentered the ranks of active teachers in 1972? This teacher is willing and able to reimburse the fund for all retirement heretofore withdrawn. . . ."

It is our understanding that the individual in question retired in 1966 from the Public School Retirement System of Missouri with forty-two years of service. At that time, she was fifty-eight years of age and then worked six years for the Division of Employment Security for the state of Missouri. Subsequently, she returned to teaching in 1972 at a much greater salary. Therefore, the individual in question would like to pay back to the Public School Retirement System of Missouri all benefits that she received between 1966 and 1972 and therefore be credited with the prior forty-two years of teaching service as well as five additional years of teaching service that she plans on obtaining in order that her retirement benefits will be calculated on the "final average salary" of her last five years of teaching service.

In connection with the above, subsection 3 of Section 169.050, RSMo, provides in part as follows:

Honorable Don Hancock

"3. No prior service credit shall be granted to any person who becomes a member after the first year of the system's operation, except as provided in subsection 5 of this section and subsection 2 of section 169.055 unless that person's failure to become a member before or during that year was due either to service in the armed forces of the United States or to attendance at a recognized educational institution for professional improvement; provided, that the board of trustees may grant prior service credit to a teacher who taught prior to August 1, 1945, if the teacher returns to teaching before July 1, 1950, and if such teacher teaches in the public schools of Missouri not less than seven years after returning before retirement, or the board of trustees may grant prior service credit to a teacher who taught prior to August 1, 1945, if the teacher returns to teaching and teaches at least one-half of the number of years between July 1, 1946, and age sixty-five but not less than seven years after returning before retirement, except that a member who will have thirty-five or more years of teaching service in Missouri at retirement shall be required to teach not less than three years after returning and before retirement.
. . ."

Also, subsection 4 of Section 169.050, RSMo, provides as follows:

"4. Membership shall be terminated by failure of a member to be a public school employee under this system for more than four of any five consecutive years, by death, withdrawal of contributions, or retirement based on either age or disability."

Lastly, subsection 5 of Section 169.050, RSMo, provides in part as follows:

"5. If a member withdraws or is refunded his contributions, he shall thereby forfeit any creditable service he may have; provided, however, if such person again becomes a member of the system, he may elect within five years after such reemployment, or before

Honorable Don Hancock

July 1, 1968, and prior to retirement, whichever is later, to reinstate any creditable service forfeited at time of withdrawal or refund. The reinstatement shall be effected by the member's paying to the retirement system with interest the amount of accumulated contributions withdrawn by him or refunded to him at the time of withdrawal or refund and by teaching in the public schools of Missouri not less than seven years after returning before retirement; provided, however, that reinstatement with respect to eligibility for disability retirement shall be effective after returning and teaching not less than three years in the public schools of Missouri if such teaching makes a total of at least eight years taught in the public schools of Missouri. . . ."

As a result of the above statutory provisions, it is our view that the provisions of subsection 3 of Section 169.050, RSMo, providing for the reinstatement of prior service credit by certain individuals under certain circumstances; and also subsection 5 of Section 169.050, RSMo, providing for reinstatement of credit after a withdrawal of contributions and with respect to eligibility for disability retirement, are not applicable. The reason being that the individual in question elected to retire in 1966 and she ceased to be a member of the Retirement System under the provisions of subsection 4 of Section 169.050, RSMo. In this regard, it is our view that any contention that her retirement was not based on age is untenable, as subsection 2 of Section 169.060, RSMo provides that any member whose creditable service is thirty years or more and whose age is less than sixty, may retire at a reduced benefit upon written application to the board of trustees. Under such circumstances, upon returning to teaching in 1972, it is our view that she became a "new member" and therefore it is our opinion that her annuity would be calculated on the basis of the annuity that she had previously received, and another annuity that she will be eligible to receive after returning to teaching in 1972 if she teaches for the minimum period necessary to become eligible for such annuity.

Very truly yours,



JOHN C. DANFORTH
Attorney General

January 18, 1974

OPINION LETTER NO. 83
Answer by letter-Wieler

Honorable James I. Spainhower
State Treasurer
Post Office Box 210
Jefferson City, Missouri 65101



Dear Mr. Spainhower:

This is in response to your request for an opinion as to whether moneys set aside for the payment of checks drawn upon the "agriculture emergency fund" should be transferred to general revenue when the checks in question have not been presented for payment within one year from the date of issuance as provided in Section 30.200, RSMo 1969.

Section 30.200, in pertinent part, provides that:

" . . . All moneys set aside to pay any outstanding check or draft which has not been presented for payment as required by this section shall be transferred to the general revenue. . . ."

However, the funds in question are funds of a special nature. The "agriculture emergency fund" was set up pursuant to the provisions of Section 261.027, RSMo 1969. The moneys in this fund are former trust assets held by the United States as trustee on behalf of the Missouri Rural Rehabilitation Corporation which have been turned over to the state of Missouri pursuant to an agreement entered into by the United States Secretary of Agriculture and the Missouri State Commissioner of Agriculture. Under the terms of the agreement with the federal government, these funds and the interest derived therefrom are to be used only for agricultural relief and rehabilitation purposes. In accepting custody of these funds, the state as a condition of acceptance bound itself to the various restrictions

Honorable James I. Spainhower

set forth by the federal government, including a comprehensive, annual accounting of the use of all moneys in the fund to federal authorities.

In effect, the state has become the successor of the federal government as trustee of these funds on behalf of the agricultural community. Accordingly, the provisions of Section 30.200 dealing with the disposition of certain funds in an ordinary account within the treasury cannot be applied to the "agriculture emergency fund." When a check drawn upon this special fund is not presented for payment within one year from the date of issuance, the money set aside to pay it should be returned to the fund and not credited to general revenue.

Yours very truly,

JOHN C. DANFORTH
Attorney General

SCHOOLS:
STATE FUNDS:
CONSTITUTIONAL LAW:
STATE HIGHWAY COMMISSION:
DRIVERS' EDUCATION COURSES:

It would be unconstitutional to appropriate revenue derived from highway users as an incident to their use or right to use the highways of the state for state approved courses in driver education in school districts.

OPINION NO. 85

June 7, 1974

Honorable Eugene L. Lang
Representative, District 114
322 McGoodwin
Warrensburg, Missouri 64093



Dear Representative Lang:

This official opinion is issued in response to your request for a ruling on the following question:

".6 of the first paragraph, Section 30(b), Article IV of the Missouri Constitution provides that state revenue derived from highway users as an incident to their use, or right to use, the highways of the state may be appropriated for 'administering and enforcing any state motor vehicle laws...'

"Would not it be constitutional therefore, to appropriate certain highway user fees for assistance to local school districts providing state approved courses in driver education, based upon the enactment of proposed legislation which would establish the successful completion of a state approved course in driver education as a requisite for the issuance of a drivers license to persons under the age of 18 years?"

Article IV, Section 30(b) of the Missouri Constitution states:

"For the purpose of constructing and maintaining an adequate system of connected state highways all state revenue derived from highway users as an incident to their use or right to use the highways of the state,

Honorable Eugene L. Lang

including all state license fees and taxes upon motor vehicles, trailers and motor vehicle fuels, and upon, with respect to, or on the privilege of the manufacture, receipt, storage, distribution, sale or use thereof (excepting the sales tax on motor vehicles and trailers, and all property taxes), less the cost (1) of collection thereof, (2) of maintaining the commission, (3) of maintaining the highway department, (4) of any workmen's compensation, (5) of the share of the highway department in any retirement program for state employees as may be provided by law, (6) and of administering and enforcing any state motor vehicle laws or traffic regulations, and less refunds and that portion of the fuel tax revenue to be allocated to counties and to cities, towns and villages under section 30(a) of Article IV of this Constitution, shall be credited to a special fund and stand appropriated without legislative action for the following purposes, and no other:

First, to the payment of the principal and interest on any outstanding state road bonds.

Second, any balance in excess of the amount necessary to meet the payment of the principal and interest of any state road bonds for the next succeeding twelve months shall be credited to the state road fund and shall be expended under the supervision and direction of the commission for the following purposes:

(1) To complete and widen or otherwise improve and maintain the state system of highways heretofore designated and laid out under existing laws;

(2) To reimburse the various counties and other political subdivisions of the state, except incorporated cities and towns, for money expended by them in the construction or acquisition of roads and bridges now or hereafter taken over by the state as permanent parts of the system of state highways, to the extent of

Honorable Eugene L. Lang

the value to the state of such roads and bridges at the time taken over, not exceeding in any case the amount expended by such counties and subdivisions in the construction or acquisition of such roads and bridges, except that the commission may, in its discretion, repay, or agree to repay, any cash advanced by a county or subdivision to expedite state road construction or improvement;

(3) In the discretion of the commission to locate, relocate, establish, acquire, construct and maintain the following:

(a) supplementary state highways and bridges in each county of the state as hereinafter provided;

(b) state highways and bridges in, to and through state parks, public areas and reservations, and state institutions now or hereafter established, and connect the same with the state highways; and also national, state or local parkways, travelways, tourways, with coordinated facilities;

(c) any tunnel or interstate bridge or part thereof, where necessary to connect the state highways of this state with those of other states;

(d) any highway within the state when necessary to comply with any federal law or requirement which is or shall become a condition to the receipt of federal funds;

(e) any highway in any city or town which is found necessary as a continuation of any state or federal highway, or any connection therewith, into and through such city or town; and

(f) additional state highways, bridges and tunnels, outside the corporate limits of cities having a population in excess of one hundred fifty thousand, either in the congested traffic areas of the state or where

Honorable Eugene L. Lang

needed to facilitate and expedite the movement of through traffic.

(4) To acquire materials, equipment and buildings necessary for the purposes herein described; and

(5) For such other purposes and contingencies relating and appertaining to the construction and maintenance of such highways and bridges as the commission may deem necessary and proper." (Emphasis added)

The words used in the Constitution are presumed to have been employed in their natural and ordinary meaning and no forced or unnatural construction is to be placed upon them. State ex rel. Randolph County v. Walden, 206 S.W.2d 979 (Mo. Banc 1947). Any limitation in the Constitution on the use of funds by the State Highway Commission is binding on the legislature and such limitation is mandatory. State ex rel. Barrett v. Hitchcock, 146 S.W. 40 (Mo. Banc 1912).

Broadly, in your opinion request you ask whether a highway user fee may be expended as a part of "administering and enforcing state motor vehicle laws or traffic regulations." Specifically, you suggest that a requirement of successful completion of a state-approved driver education course as a requisite for the issuance of a driver's license would be the administration or enforcement of a state motor vehicle law. Application of the principles of constitutional construction cited herein and the principles expressed in decisions interpreting the constitutional provisions dealing with the expenditure of highway moneys compel this question to be answered in the negative.

There have been several instances in which attempts to divert highway user taxes to other purposes than those expressed in the Constitution have been thwarted. In an unreported decision, the Circuit Court of Cole County declared unconstitutional Senate Bill No. 39 enacted by the 70th General Assembly which diverted the driver's license fund to the state revenue fund. State Highway Commission v. Mount Etna Morris (unreported decision issued 10-6-60). The St. Louis Court of Appeals, in State ex rel. State Highway Commission v. Pinkley, 474 S.W.2d 46 (St.L.Ct.App. 1971), rejected the contention of the State Highway Commission that Article IV, Section 30(b) (5) authorizes the Commission to provide a rest area abutting a state route, holding that subsection (5) did not grant any new or unspecified power. This office in Opinions No. 224, Walsh, April 26,

Honorable Eugene L. Lang

1967, and No. 23, Graham, February 1, 1972, held that the State Highway Department does not have authority to use state funds for the purpose of making surveys and tests for the establishment of an airport in Lake Ozark State Park and that the State Highway Commission may not utilize state road or highway fund moneys to defray the cost of the administration of a system of permits for the regulation of outdoor advertising. These holdings and opinions are structured on strict and literal interpretations of the language of Article IV, Section 30(b) of the Missouri Constitution.

The extreme restrictions which are placed on highway user fees are further set forth in Joseph L. Pohl, Contractor v. State Highway Commission, 431 S.W.2d 99 (Mo. Banc 1968). In that case, the State Highway Commission expended highway user fees on a road which was to be constructed by the issuance of revenue bonds and then placed in the state highway system. At page 105, the court stated:

" . . . The people thereby emphasized their determination that the highway user taxes could be used only for the purposes listed in the Constitution and, as we have previously held, toll roads are not included. . . ."

This holding was made in spite of the fact that Section 30(b) says that the State Highway Commission may expend these funds "For such other purposes and contingencies relating and appertaining to the construction and maintenance of such highways and bridges as the commission may deem necessary and proper."

More recently, in State Highway Commission v. Spainhower, 504 S.W.2d 121 (Mo. 1973), the State Highway Commission brought an action against the State Treasurer for declaratory judgment in order to ascertain whether it was constitutionally required that interest on the state road fund be paid into such fund. The Supreme Court held that interest or income from such fund must be credited to that fund under constitutional provision and held against transfer or use for any purpose other than state highway purposes. In addition, the court remarked that the intent of the constitutional provision that all state revenue derived from highway users as an incident to their use or right to use highways of the state shall be credited to a special fund and stand appropriated without legislative action for specified road purposes is that no money be diverted from the state road fund and no other use be permitted of the fund except for enumerated purposes.

Article IV, Section 30(b) of the Missouri Constitution expressly enumerates the purposes for which state highway funds may

Honorable Eugene L. Lang

be allocated. The language is explicit and precise. It neither describes nor authorizes a nexus between the concept of requisite driver education and the administration and enforcement of state motor vehicle laws or traffic regulations.

CONCLUSION

Therefore, it is the opinion of this office that it would be unconstitutional to appropriate revenue derived from highway users as an incident to their use or right to use the highways of the state for state approved courses in driver education in school districts.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Jay M. Shapiro.

Yours very truly,

A handwritten signature in cursive script, reading "John C. Danforth". The signature is written in dark ink and is positioned above the printed name.

JOHN C. DANFORTH
Attorney General

HOSPITALS: A nursing home operated by hospital
NURSING HOMES: trustees in conjunction with a hos-
COUNTY HOSPITALS: pital organized under Section 205.160,
COUNTY NURSING HOMES: RSMo, is a "related facility" within
the provisions of Section 1 of House
Bill No. 1262, 76th General Assembly, and revenue bonds issued un-
der such bill may be used for the construction, improvement, and
repair of such combined hospital and nursing facility. Nursing
homes which are governed by the county court under Section 205.375,
RSMo, may be constructed and equipped by the issuance of revenue
bonds under that section but not under House Bill No. 1262.

OPINION NO. 86

January 24, 1974

Honorable John W. Reid, II
Prosecuting Attorney
Madison County
148 East Main Street
Fredericktown, Missouri 63645



Dear Mr. Reid:

This opinion is in answer to your request for an opinion of
this office asking:

"May a County Hospital organized under 1969
R.S. Mo. 205.160 or a County Court issue
Revenue Bonds for purposes of adding on to
the existing hospital and also provide for
a Nursing Home as defined in R.S. Mo. 205.
375.

"If the answer is yes, which Statute should
be used to issue the Revenue Bonds. 1969
R.S. Mo. 205.375 or 1972 (S.C.H.B.) 1262
which can be found on page 840 Laws of Mis-
souri 1971-1972."

You also state that:

"Madison Memorial Hospital, a County Hospital
organized under 1969 R. S. Mo. 205.160 de-
sires to build on to the existing hospital
partly to expand the existing hospital and
also provide for Nursing home care as defined
in 1969 R.S. Mo. 205.375. The estimated cost

Honorable John W. Reid, II

will be 3/4 of a Million Dollars. The proposed method to finance the cost of the construction is through Revenue Bonds pursuant to 1969 R.S. Mo. 205.375 (3) or pursuant to 1972 (S.C.H.B.) 1262 which can be found on page 840 Laws of Missouri 1971-1972."

The provisions for county hospitals are found in Sections 205.160, RSMo et seq., as amended by Senate Committee Substitute for House Bill No. 1262, 76th General Assembly, and the provisions for county nursing homes are found in Section 205.375, RSMo. Both contain separate provisions respecting the issuance of revenue bonds. Subsection 3 of Section 205.375 with respect to county nursing homes provides:

"For the purpose of providing funds for the construction and equipment of nursing homes the county courts or township boards may issue bonds as authorized by the general law governing the incurring of indebtedness by counties, provided however that no such tax shall be levied upon property which is within a nursing home district as provided in chapter 198, RSMo, and is taxed for nursing home purposes under the provisions of that chapter, or may provide for the issuance and payment of revenue bonds in the manner provided by and in all respects subject to chapter 176, RSMo, which provides for the issuance of revenue bonds of state educational institutions." (emphasis added)

On the other hand House Bill No. 1262 added four new sections to the laws relating to county hospitals, Section 1 thereof providing that:

"In addition to the bonds authorized by section 205.160, RSMo, the county court in any county exercising the rights conferred by sections 205.160 to 205.340, RSMo, may issue and sell revenue bonds for the purpose of providing funds for the acquisition, construction, equipment, improvement, extension and repair, and furnishing of hospitals and related facilities, and of providing a site therefor, including offstreet parking space for motor vehicles. Such revenue bonds shall be payable, both as to principal and interest,

Honorable John W. Reid, II

solely from the net income and revenues arising from the operation of the hospital or the related facility or facilities, or of the hospital and the related facility or facilities, after providing for the costs of operation and maintenance thereof, or from other funds made available from sources other than from proceeds of taxation." (emphasis added)

In answer to the question as to whether or not revenue bonds issued under House Bill No. 1262 may be used for the cost of construction of nursing homes to be operated in conjunction with the operation of the hospital organized pursuant to Section 205.160, it is our view that such use is proper. This is because the Supreme Court of Missouri in State ex rel. Phelps County v. Holman, 461 S.W.2d 689 (Mo. banc 1971) with respect to the vice of double-ness in a bond issue election stated at l.c. 691:

" . . . We are aware that in these times a hospital in an area of the location and population size of Phelps County and a nursing home (which, generally speaking, in the main is for the aging) are rather closely and naturally related. Geriatrics is a branch of medicine and in these days medical care is closely connected to the hospital. The proposed nursing home is for the public, as is Phelps County Memorial Hospital, and it is entirely logical and reasonable for the two to be connected and operated together. . . ."

Thus, the court has recently held that such hospital and nursing home facilities are "related" and the 76th General Assembly by House Bill No. 1262 authorized the issuance of revenue bonds for "hospitals and related facilities."

We note that in the Phelps County case the nursing home was operated as a part of the hospital. However, it appears that the revenue bonds for a nursing home which is governed by the county court under Section 205.375 as a separate institution should be issued under the provisions of Section 205.375.

CONCLUSION

It is the opinion of this office that a nursing home operated by hospital trustees in conjunction with a hospital organized under Section 205.160, RSMo, is a "related facility" within the provisions of Section 1 of House Bill No. 1262, 76th General Assembly, and revenue bonds issued under such bill may be used for the construction,

Honorable John W. Reid, II

improvement, and repair of such combined hospital and nursing facility. Nursing homes which are governed by the county court under Section 205.375, RSMo, may be constructed and equipped by the issuance of revenue bonds under that section but not under House Bill No. 1262.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Yours very truly,

A handwritten signature in cursive script, reading "John C. Danforth". The signature is written in dark ink and is positioned above the printed name.

JOHN C. DANFORTH
Attorney General

*QW 100
107, 3/1/64
1/14/64, Presc*

LIBRARIES:
COUNTY LIBRARIES:
CITY LIBRARIES:
CONSTITUTIONAL LAW:

A city or county library district has authority to lease land for a library building. The leases may be for a term of years provided the current income and revenue and surplus from previous years on hand at the time the lease is executed are sufficient to provide for the payments called for by the lease.

September 17, 1974

OPINION NO. 88

Mr. Charles O'Halloran
Missouri State Library
308 East High Street
Jefferson City, Missouri 65101



Dear Mr. O'Halloran:

This is in response to your request for an opinion on the following question:

"May a city library district or a county library district, both of which are political subdivisions of the state, enter into an agreement with a property owner whereby the library district, for either annual payments or a lump sum payment, would obtain a long term lease up to a 99-year lease on a tract of land on which the library district would then erect a building to be paid for with public funds?"

A county library district under Section 182.070, and a city library district under Section 182.200.5, has the power to lease ground for a library. However, Article VI, Section 26 (a) of the Constitution prohibits a political corporation, such as a library district, from becoming indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years. Under this constitutional provision, a long term lease which over its course would call for the expenditure of an amount exceeding the revenue and income for the year the lease was executed plus the surplus from previous years

Mr. Charles O'Halloran

on hand would be a debt and void under Article VI, Section 26 (a). See: Ebert v. Jackson County, 70 S.W.2d 918 (Mo. 1934), and Opinion No. 304, Kiser, November 9, 1965.

CONCLUSION

Therefore, it is the opinion of this office that a city or county library district has authority to lease land for a library building. The leases may be for a term of years provided the current income and revenue and surplus from previous years on hand at the time the lease is executed are sufficient to provide for the payments called for by the lease.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Charles A. Blackmar.

Very truly yours,



JOHN C. DANFORTH
Attorney General

Enclosure:

Op.No. 304
11/9/65, Kiser

AMBULANCES: Section 20 of Senate Bill No. 57,
CONSTITUTIONAL LAW: 77th General Assembly, First Regu-
GOOD SAMARITAN LAW: lar Session [Section 190.195, RSMo
Supp. 1973], which purports to lim-
it the civil liability of certain persons rendering emergency med-
ical services, violates the provisions of Article III, Section 23
of the Constitution of Missouri and is, therefore, void.

OPINION NO. 89

May 28, 1974

Honorable Donald L. Gann
Representative, District 142
706 North 10th
Ozark, Missouri 65721



Dear Representative Gann:

This opinion is issued in response to your request for an of-
ficial ruling construing a certain provision of Senate Bill No. 57,
77th General Assembly, First Regular Session. Your opinion request
reads in full as follows:

"Would the language in Section 20 of
Senate Bill No. 57 which was passed in the
First Regular Session of the 77th General
Assembly include persons licensed to prac-
tice under Chapters 334-335, RSMo while
acting in emergency cases, or does that
section cover only emergency medical per-
sonnel--that is, the ambulance attendants
only?"

Section 20 of Senate Bill No. 57 [Section 190.195, RSMo Supp.
1973] provides:

"Any person who has been trained to provide
first aid in a standard, recognized training
program may render emergency care or assis-
tance to the level for which he or she has
been trained, at the scene of an emergency
or accident, and shall not be liable for
civil damages for acts or omissions other
than damages occasioned by gross negligence
or by willful or wanton acts or omissions by
such person in rendering such emergency care."

Honorable Donald L. Gann

Your question, in effect, asks whether the language of this section is broad enough to include physicians and surgeons licensed under the provisions of Chapter 334, RSMo 1969, and nurses licensed under the provisions of Chapter 335, RSMo 1969.

We believe that it is. Section 190.195 specifically applies to "any person" who has received certain specific first-aid training. It does not purport to apply only to ambulance attendants and drivers. "Person" is defined by Section 1(10) [Section 190.100(10)] as:

" . . . any individual, firm, partnership, association, corporation, company, group of individuals acting together for a common purpose or organization of any kind, including any governmental agency other than the United States or the state of Missouri." (emphasis added)

It should be noted that when Senate Bill No. 57 intends to apply solely to ambulance attendants and drivers it so states in unequivocal language. For example, Section 19 [Section 190.190] begins, "Any ambulance, attendant or attendant-driver . . ."

In view of the language cited above, it would seem obvious that Section 190.195 was meant to apply, not only to ambulance attendants and drivers, but to any individual who has been trained to provide first aid in a standard, recognized training program. This, of course, would certainly include doctors and nurses licensed under the provisions of Chapters 334 and 335.

Section 190.195 is, in effect, what is commonly known as a "Good Samaritan" law. In fact, the language employed by such section is strikingly similar to language found in the Good Samaritan laws of other states. See Comment, Good Samaritan Legislation: An Analysis and A Proposal, 38 Temple L.Q. 418 (1965).

However, it is our view that in attempting to include a Good Samaritan law in a bill ostensibly dealing exclusively with ambulances, the legislature has violated the provisions of Article III, Section 23 of the Constitution of Missouri. That section provides, with two exceptions not applicable here:

"No bill shall contain more than one subject which shall be clearly expressed in its title, . . ."

Honorable Donald L. Gann

This section is mandatory and requires that the title of an act point to a single subject matter and matters germane thereto. Star Square Auto Supply Co. v. Gerk, 30 S.W.2d 447 (Mo. 1930).

We recognize, of course, that legislative enactments are presumed to be constitutional, and will not be held unconstitutional under this section, unless it is impossible to do so without doing violence to the language and evident intent of the statute. State v. Thomas, 256 S.W. 1028 (Mo. 1923). Also, this section is to be liberally construed, and if the contents of the statute fairly relate to and have a natural connection with the subject expressed in the title, they fall within the title. State v. King, 303 S.W.2d 930 (Mo 1957). Or, to put it another way, when all the provisions of the statute fairly relate to this subject, having natural connection with it, and are the incidents or the means accomplishing it, then the subject is single. Thomas v. Buchanan County, 51 S.W.2d 95 (Mo. Banc 1932).

Notwithstanding the above, it is our opinion that Section 20 does not in any way relate to or have a natural connection with the title or subject matter of Senate Bill No. 57. The title of the bill reads:

"AN ACT

Relating to ambulances, with penalty provisions and effective dates."

The entire bill, with the exception of Section 20, deals exclusively with ambulances, ambulance attendants, attendant-drivers, and mobile emergency medical technicians.

Section 20, however, has nothing to do with ambulances. Instead, it attempts to limit the civil liability of certain persons performing emergency care at the scene of an accident. This attempt, we believe, violates Article III, Section 23, which dictates that matters which are incongruous, disconnected, and without a natural relation to each other, must not be joined in one bill and requires that the title must be a fair index of the matters in the bill. State ex rel. Niedermeyer v. Hackmann, 237 S.W. 742 (Mo. Banc 1922).

Therefore, since Section 20 of Senate Bill No. 57 is unrelated to, and beyond the scope of the bill's title, the matters contained in such section are void. State ex rel. Fire Dist. of Lemay v. Smith, 184 S.W.2d 593 (Mo. Banc 1945).

Honorable Donald L. Gann

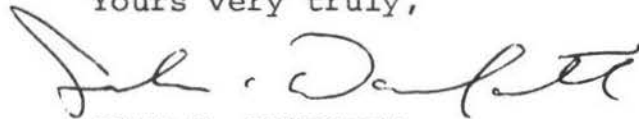
It should be noted that several bills were introduced in the Second Regular Session of the 77th General Assembly which would have expanded the title of Senate Bill No. 57, so as to bring Section 20 within its scope. However, none of these bills passed.

CONCLUSION

It is the conclusion of this office that Section 20 of Senate Bill No. 57, 77th General Assembly, First Regular Session [Section 190.195, RSMo Supp. 1973], which purports to limit the civil liability of certain persons rendering emergency medical services, violates the provisions of Article III, Section 23 of the Constitution of Missouri and is, therefore, void.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Philip M. Koppe.

Yours very truly,

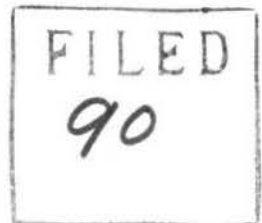
A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

January 8, 1974

OPINION LETTER NO. 90
Answer by Letter - Klaffenbach

Honorable Max Patten
Prosecuting Attorney, Jasper County
Municipal Building, 303 East Third
Joplin, Missouri 64801



Dear Mr. Patten:

This letter is in response to your opinion request asking:

"Whether RSMo. Statutes, 1969, 52.360 requires the County Collector [of a second class county] to deposit all monies collected by him into interest bearing accounts until such time as he needs them for withdrawal."

The section to which you refer has been amended by House Bill No. 644 of the 77th General Assembly, which provides:

"The county collector, in all counties of the first class not having a charter form of government and in all counties of the second class, shall deposit each day in the depositories selected by the county for the deposit of county funds, all money received by him as county collector during the day previous, and make a daily report thereof to the county auditor, as provided in section 55.190, RSMo. The interest on all money deposited by the county collector shall be computed upon the daily balances of the deposits, and all of the interest shall be paid and turned over to the county treasurer at the time and in the manner that the monthly settlement and

Honorable Max Patten

payment are made by the collector, and the interest shall go to the general revenue fund of the county."

Despite the fact that Section 52.360 requires that the interest shall go into the general revenue fund of the county we find no requirement that the collectors place such money in interest bearing accounts.

We conclude that the collectors are not required to place such money in interest bearing accounts.

We are enclosing Opinion No. 113 issued June 15, 1970, to James Millan, which points out that a county collector can deposit tax monies in time deposits.

Very truly yours,

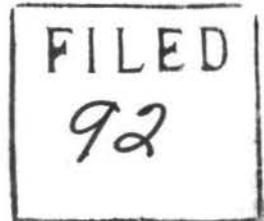
JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 113
6-15-70, Millan

March 29, 1974

OPINION LETTER NO. 92
Answer by Letter - Vodra

Dr. Arthur L. Mallory
Commissioner of Education
Department of Education
Jefferson State Office Building
Jefferson City, Missouri 65101



Dear Dr. Mallory:

This letter is in response to your request for a ruling on the following questions:

"1. Does the election of county school board members as provided in Section 162.111, RSMo, constitute a separate election, or is this action merely another proposition to be placed before the voters at the annual school election?

"2. Is it mandatory that voting precincts be established in every township wholly or partially within a school district when the only questions or propositions before the voters at elections held on the first Tuesday in April are the election of district board members and county board members?"

I.

Section 162.111, RSMo 1969, includes the following language:

"1. There is created in each second, third and fourth class county in this state a county board of education whose members shall be elected by popular vote at the annual school election held on the first Tuesday in April

Dr. Arthur L. Mallory

in each year. Each member shall be a citizen of the United States and of the state of Missouri; a resident householder and voter of the county, and shall be not less than twenty-four years of age. Nominations for board members shall be filed with the secretary of the county board of education at least thirty days before the election. The county board of education shall prepare ballots and publish notice for such election in the same manner as for boards of education in school districts."

Since the members of a county board are to be "elected . . . at the annual school election," we believe that their election is simply part of the annual school election and does not constitute a separate or special election.

II.

From your opinion request we understand that you are concerned with counties which do not have boards of election commissioners. The establishment of voting precincts for all elections in all parts of Missouri which do not have boards of election commissioners is now controlled by House Bills Nos. 20, 71, 94 and 97, 77th General Assembly, First Regular Session (1973), codified in Chapter 114, V.A.M.S. Section 114.116 provides election precincts to be set in each county, and subsection 2 of Section 114.116 states that:

"2. No election precinct established in any city, town or village, which for municipal election purposes is subject to the provisions of sections 114.011 to 114.146, shall encompass territory outside the corporate limits of the city, town or village, nor shall such precinct encompass territory in more than one county."

Further, Section 111.091, RSMo 1969, specifically permits election districts or precincts which include parts of two townships (but not two entire townships - see Opinion 115, Weybrew, February 11, 1971, copy enclosed). Section 111.091 reads as follows:

"The county courts of the several counties in this state may divide any township in

Dr. Arthur L. Mallory

their respective counties into two or more election districts, or may establish two or more election precincts in any township or may establish election districts which consist of contiguous portions of two adjoining townships, and may alter such election districts and precincts, from time to time, as the convenience of the inhabitants may require"

Therefore, we conclude that it is not necessary that voting precincts be established in each township for school elections, so long as the precinct boundaries are otherwise in conformity with law.

It should be noted that the choice of polling places outside of cities and towns which are also holding elections the same day remains under the direction of the school districts which conduct the election. Sections 114.121, 114.136 and 162.371, V.A.M.S. Since this is a regular and not a special election, however, the district may not consolidate precincts pursuant to Section 162.381, RSMo 1969. Rather, there must be one polling place in each precinct.

It is, therefore, our view that (1) the election of county school board members is part of the annual school election and is not a separate election, and (2) counties governed by Chapter 114, V.A.M.S. (House Bill No. 20, 77th General Assembly, (1973)), need not have a voting precinct in each township for school elections, so long as there is a polling place in each precinct.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 115
2/11/71, Weybrew



OFFICES OF THE

JOHN C. DANFORTH
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

March 29, 1974

OPINION LETTER NO. 94

Mr. Charles A. Shaffer, Director
Division of Management Systems
Office of Administration
State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Shaffer:

This is in response to your request for an opinion regarding:

- "A. Which, if any, state agencies may not under existing statutes (RSMo 1969) self insure its workmen's compensation liability?
- "B. Which, if any, specific RSMo 1969 statutes would require amendment or revision to permit total self insurance by all state agencies, (including the Curators of the University of Missouri) of their workmen's compensation liability?"

Workmen's compensation benefits are currently made available to state employees under three classes of statutes. Statutes requiring the state of Missouri to be a self-insurer and assume all liability imposed by the Workmen's Compensation Law are:

(a) Section 202.024, RSMo 1969, applicable to all employees and authorized student and volunteer workers of the Division of Mental Health;

(b) Section 207.070, RSMo 1969, applicable to all employees of the Division of Welfare, including the Federal Soldier's Home;

Mr. Charles Shaffer

(c) Section 216.183, RSMo 1969, applicable to all employees of the Department of Corrections, the Board of Training Schools, and the Board of Probation and Parole.

Another class of statute is Section 226.160, RSMo 1969, which is applicable to employees of the State Highway Commission primarily engaged in maintenance and construction work and to uniformed members of the State Highway Patrol. It requires the agency, after electing to accept the provisions of the Workmen's Compensation Law, to purchase insurance to cover its liability under the law.

A third class of statutes extends the Workmen's Compensation Law to certain state agencies and permits each such agency to exercise the option to self-insure or purchase insurance to cover its liability under the law. Statutes in this class are:

(a) Section 374.270, RSMo 1969, applicable to all employees of the Division of Insurance, in accordance with rules adopted by the division classifying the employees who are eligible for coverage under the Workmen's Compensation Law. Insurance has been purchased to cover the division's liability under the Workmen's Compensation Law.

(b) Section 41.900, RSMo 1969, applicable to members of the Missouri organized militia when ordered to active state duty by the Governor. The Adjutant General has elected to self-insure its liability under the Workmen's Compensation Law.

(c) Section 105.810, RSMo 1969, applicable to all state employees, but modified by Section 105.830, RSMo 1969, so that it does not affect any department or constitutional agency which is already under the Workmen's Compensation Law. Conformity with this statute has been effected by insurance providing workmen's compensation benefits for state employees not previously covered under the Workmen's Compensation Law.

With respect to the University of Missouri, workmen's compensation benefits have been provided under the authority granted by the Constitution of Missouri, Article IX, Section 9(a) and Section 172.300, RSMo 1969, independently of any of the statutes referred to above. The Board of Curators of the University brought

Mr. Charles Shaffer

its employees under the Workmen's Compensation Law by filing with the Division of Workmen's Compensation its election, as an exempted employer under Section 287.090, RSMo 1969, to bring the University employees under the Workmen's Compensation Act and purchased insurance to cover its liability under the act.

The answer to your first question is that under existing statutes, RSMo 1969, the Highway Commission cannot self-insure its liability under the Workmen's Compensation Law with respect to:

- (a) Its employees primarily engaged in maintenance and construction work, or
- (b) Uniformed members of the State Highway Patrol.

With reference to your second question, amendment of Section 226.160, RSMo 1969, would be required in order that all state agencies may be self-insured for workmen's compensation. In addition to that amendment, it would be necessary that state agencies whose liabilities under the Workmen's Compensation Law are presently covered by insurance but which have the right to be self-insured under the Workmen's Compensation Law exercise their options to so self-insure. The University of Missouri is included in the class of state agencies having the right to self-insure.

Yours very truly,



JOHN C. DANFORTH
Attorney General

January 25, 1974

OPINION LETTER NO. 95
Answer by Letter - Klaffenbach

Harold P. Robb, M.D., Director
Division of Mental Health
Post Office Box 687
Jefferson City, Missouri 65101



Dear Dr. Robb:

In answer to your request for an opinion concerning whether an Equal Employment Opportunity Commission investigator has the authority to make a random sampling review of personnel files of the Division of Mental Health, we note that the question involves specific cases being investigated by the Commission. We therefore are of the view that we must adhere to our rule and not render an opinion on a matter actually in controversy.

We will be pleased to review the matter with Mr. Ashby. We are enclosing a copy of this letter to Mr. Ashby, as well as a copy of a letter and attachments received from the district counsel for the Commission.

Very truly yours,

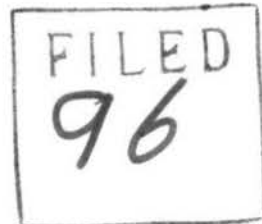
JOHN C. DANFORTH
Attorney General

cc: Mr. Richard C. Ashby
General Counsel
Division of Mental Health

January 9, 1974

OPINION LETTER NO. 96
Answer by Letter - Klaffenbach

Honorable James A. Noland, Jr.
Missouri Senate, 33rd District
Rural Route 1
Osage Beach, Missouri 65065



Dear Senator Noland:

This letter is in response to your question asking:

"What is the duty of a county clerk when a candidate for prosecuting attorney who is not a resident of the county files for re-nomination and reelection?"

Section 56.010, as amended by Senate Bill No. 13, effective January 1, 1973, provides:

"At the general election to be held in this state in the year A.D. 1880, and every two years thereafter, there shall be elected in each county of this state a prosecuting attorney, who shall be a person learned in the law, duly licensed to practice as an attorney at law in this state, and enrolled as such, at least twenty-one years of age, and who has been a bona fide resident of the county in which he seeks election for twelve months next preceding the date of the general election at which he is a candidate for such office and shall hold his office for two years, and until his successor is elected, commissioned and qualified; except that at the general election in 1974, and every four years

Honorable James A. Noland, Jr.

thereafter, in counties of the first class not having a charter form of government, and in counties of the second class, the prosecuting attorney shall be elected for a term of four years."

The declaration of candidacy for the office of prosecuting attorney is to be filed with the county clerk under the provisions of Section 120.370, RSMo.

Your question is answered by our Opinion No. 87, dated April 11, 1972, to Usrey, copy enclosed, in which we held that a county clerk may refuse to place the name of a candidate he believes to be ineligible on the ballot and his action is subject to review by the courts.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 87
4-11-72, Usrey

SUNSHINE ACT:
PUBLIC RECORDS:
AGRICULTURE:
MILK SALES ACT:
RULES AND REGULATIONS:

Subsection 2 of Section 4,
C.C.S.S.B. No. 1, 77th General
Assembly (Sunshine Bill), excludes
the information required to be
filed by the Commissioner of Agri-
culture Rules 2.06 and 2.07 from

being "public records" open to the public. It is our further
opinion that the legislature in subsection 5 of Section 4 of
the "Sunshine Bill" intended to exclude the information filed
pursuant to Rules 2.06 and 2.07 as "public records" open to
the public.

OPINION NO. 98

FILED
98

March 13, 1974

Honorable Paul L. Bradshaw
Senator, District 30
Senate Post Office
Capitol Building
Jefferson City, Missouri 65101

Dear Senator Bradshaw:

This opinion is in response to your request for an official opinion of this office, which request reads as follows:

"Is information filed with the Commissioner of Agriculture in accordance with rules and regulations promulgated pursuant to the Missouri Unfair Milk Sales Practices Act, Sections 416.410 et seq. RSMo 1969, required to be made available for public inspections by the provisions of Senate Bill No. 1, Seventy-seventh General Assembly, First Regular Session, notwithstanding the provisions of any other law or regulation including Rule 2.09 promulgated by the Commissioner of Agriculture?"

More specifically you state that Rules 2.06 and 2.07 require milk processors and distributors to file with the Commissioner of Agriculture certain information relating to the prices charged for all milk products. Rule 2.09 provides that

Honorable Paul L. Bradshaw

all such information filed "will be kept confidential and not made available to the public." However, you state that members of the public have requested to inspect information filed pursuant to Rules 2.06 and 2.07, claiming that such records are now made public by C.C.S.S.B. No. 1, 77th General Assembly, commonly known as the "Sunshine Bill."

There is no question of course that the "Sunshine Bill" applies to the Department of Agriculture. Section 1(1) C.C.S.S.B. No. 1, 77th General Assembly.

However a significant question does exist as to whether information required under Rules 2.06 and 2.07 constitutes "a public record" as defined in subdivision (3) of Section 1 C.C.S.S.B. No. 1. The information filed with the Department of Agriculture is not the record of any proceeding or action by any public body. Rather, it is a record of the business of private industry, and is compiled and filed by private industry. In the absence of the Commissioner's rules, this information would not be subject to disclosure to anyone.

It is not necessary to resolve the fundamental question of what constitutes "a public record" in this opinion for the reason that, even if this information did constitute a public record we believe that it would fall within the exceptions of subsections 2 and 5 of Section 4 of the "Sunshine Bill".

Subsections 2 and 5 of Section 4 provide as follows:

"2. Any meeting, record or vote pertaining to legal actions, causes of action, or litigation involving a public governmental body, leasing, purchase or sale of real estate where public knowledge of the transaction might adversely affect the legal consideration therefor, may be a closed meeting, closed record, or closed vote.

"5. Other meetings, records or votes as otherwise provided by law may be a closed meeting, closed record, or closed vote."

In order to determine the applicability of these exceptions, a closer examination of the purpose of Rules 2.06 and 2.07 is required.

The Supreme Court of Missouri, En Banc, discussed the purpose of these rules in a case challenging their basic validity, Foremost-McKesson, Inc. v. Davis, 488 S.W.2d 193 (Mo.Banc 1972).

Honorable Paul L. Bradshaw

In determining the validity of the rules the Court analyzed the milk law (Missouri Unfair Milk Sales Practices Act, Section 416.410, et seq. RSMo 1969), as well as the rules, as to the need for regulation in the milk industry. The Court recognized that the milk law "is not self-enforcing" and that the Commissioner of Agriculture is authorized to promulgate rules to carry out the purposes of the act. The Court also noted that for the preceding ten years the number of milk processors had declined by at least fifty percent and that almost every state had imposed some type of restriction on the dairy industry in order to insure an adequate supply of milk at a fair price determined by wholesome and fair competition. Thus, the Court noted the need for close scrutiny and supervision of the milk industry. Foremost-McKesson, 1.c. 197.

In upholding the reasonableness of Rules 2.06 and 2.07, the Court considered their relationship to the Commissioner's statutory enforcement remedies of injunction and suspension and revocation of licenses. The Court said:

"The only way a violation could be apparent to the Commissioner is to give him the means necessary to gain cost information. Otherwise the 1963 amendment to Section 416.450 would be meaningless. The remedies available under Section 416.450 are injunctions and under 416.490 suspension or revocation of licenses; These are the only remedies which the Commissioner is trying to enforce."
488 S.W.2d 193, 1.c. 198.

Thus, the Court recognized that the purpose for these rules is to aid in the enforcement of the milk law by the statutory remedies of injunction and the suspension or revocation of licenses. This being the case, it is the opinion of this office that information filed pursuant to Rules 2.06 and 2.07 are records "pertaining to legal actions, causes of action or litigation" within the meaning of subsection 2 of Section 4 of the "Sunshine Bill."

In addition, we believe that to construe the "Sunshine Bill" as opening up milk pricing information, filed under the assurance of confidentiality, to inspection by competing processors and distributors of milk, would be such a subversion of the purpose of the milk law that it would bring into effect the exception to the "Sunshine Bill" found in subsection 5 of Section 4.

In Foremost-McKesson, 1.c. 202, the Supreme Court of Missouri stated that the milk law is a price-filing law, not a price-fixing law. Yet, if the milk law, and the rules

Honorable Paul L. Bradshaw

promulgated thereunder were to serve as a vehicle for the exchange of pricing information between competitors, the milk law would be transformed into precisely the price-fixing law the Supreme Court of this State said that it was not.

It is well settled that exchange among competitors of information about the "most recent prices charged or quoted" constitutes a strong presumption of price fixing condemned by Section 1 of the Sherman Act and Section 416.010 eq seq., RSMo 1969. United States v. Container Corporation of America, 393 U.S. 333. We do not believe that in passing the "Sunshine Bill" the General Assembly intended to establish price fixing in the milk industry by turning the Department of Agriculture into a conduit for the flow of pricing information from one competitor to another.

Rule 2.09 provides:

"Prices filed with the Commissioner of Agriculture pursuant to Rule 2.06 of these rules, and reports of price change as provided by Rule 2.07 of these rules will be kept confidential and not be made available to the public."

Since the recognized purpose of the milk law and rules is to encourage competition and to discourage restraints in trade, it follows that there is not only a valid reason for Rule 2.09, but also that Rule 2.09 is a necessity. This, we believe, is what the Court implied in Foremost-McKesson as discussed above, and is the reason the Court recognized the confidentiality rule. Foremost-McKesson, l.c. 201.

In construing statutes, it is presumed that the legislature is aware of other laws affected, and decisions concerning such laws. Smith v. Pettis County, 345 Mo. 839, 136 S.W.2d 282; Howlett v. Social Security Commission, 347 Mo. 784, 149 S.W.2d 806; Glaser v. Rothschild, 221 Mo. 180, 120 S.W. 1. New legislation must be construed and applied consistently with construction placed upon the related parts of the general law. Fiske v. Buder, 125 F.2d 841 (C.C.A. Mo.).

Furthermore, as stated in Foremost-McKesson, l.c. 197:

"Appellants in seeking to overturn administrative rules and regulations bear a heavy burden, as we said in King v. Priest (banc), 357 Mo. 68, 206 S.W.2d 547, 552: 'In view of the broad authority granted respondents by statute, supra, and the admitted adoption of the rule pursuant

Honorable Paul L. Bradshaw

thereto, the rule must be regarded as prima facie reasonable . . . The burden rested upon appellants to plead facts to show the invalidity of the rule . . . Only in a clear case will the courts interfere on the ground of unreasonableness . . .'"

Thus, in interpreting the "Sunshine Bill" the legislature is presumed to have known of Foremost-McKesson and Rule 2.09, and also Section 416.020. The legislature then knew of the purpose of the milk law and rules and their importance as an encouragement of competition and as a control against restraint of trade. The legislature must also have then known of the reason for Rule 2.09 and the implication by the Court in Foremost-McKesson of the need for this rule.

Because Rules 2.06 and 2.07 have been held by the Supreme Court of Missouri to be integrally related to the enforcement of the milk law, and because we believe that the confidentiality assured by Rule 2.09 is necessary to the administration of the milk law, it is our view that subsection 5 of Section 4 of the "Sunshine Bill" is applicable, and that the records in question are closed as provided by law.

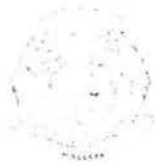
CONCLUSION

Therefore it is our opinion that because of the specific nature of the milk law, and the necessity of these regulations to enforce such law through injunctive actions or suspension or revocation of administrative licenses, as expressed by the Court in Foremost-McKesson, Inc. v. Davis, 448 S.W.2d 193 (Mo. Banc 1972), subsection 2 of Section 4, C.C.S.S.B. No. 1, 77th General Assembly (Sunshine Bill), excludes the information required to be filed by Commissioner of Agriculture Rules 2.06 and 2.07 from being "public records" open to the public. It is our further opinion that the legislature in subsection 5 of Section 4 of the "Sunshine Bill" intended to exclude the information filed pursuant to Rules 2.06 and 2.07 as "public records" open to the public.

Yours very truly,



JOHN C. DANFORTH
Attorney General



RECEIVED

FEB 26 1974

COUNTY AUDIT DIVISION

JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICE OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

January 18, 1974

File

u Taxation

OPINION LETTER NO. 100

Honorable Larry R. Marshall
Missouri Senate, 19th District
Room 319, Capitol Building
Jefferson City, Missouri 65101

Dear Senator Marshall:

This letter is in response to your inquiry asking whether a levee district has authority to levy a tax on the real property of a public water supply district.

We assume you refer to levee districts which are organized under the provisions of Chapter 245, RSMo, and public water supply districts organized under the provisions of Chapter 247, RSMo. Such a water supply district is a political subdivision of the state of Missouri under the provisions of Section 15 of Article X of the Missouri Constitution and as such is exempt from taxation under the provisions of Section 6 of Article X of the Missouri Constitution.

In this respect we enclose a copy of our Opinion 97, dated September 23, 1948, to Wilson, holding that real estate owned by a municipality is exempt from taxation.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 97
9-23-48, Wilson

TAXATION:

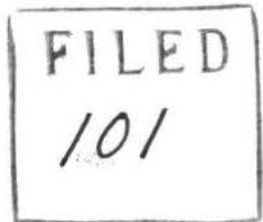
FIRE PROTECTION DISTRICTS:

Taxes may be levied by the governing body of a county on behalf of a fire protection district at the time required by law for levy of taxes for county purposes, whether or not the board of such district has certified its rate of levy to the county governing body by May 15. The tax may be imposed for a full year, although the district in question was formed after January 1.

OPINION NO. 101

February 8, 1974

Honorable Howard E. Hines
Representative, District 40
Room 311, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Hines:

This official opinion is issued in response to your request for a ruling on the following question:

"Are the Commissioners or the board of the Salem Fire District in Jackson County, Missouri required by law to certify a rate of levy to the County Court or an equivalent body by the fifteenth day of May of each year that taxes are assessed and collected?"

Your question has arisen in the context of the following factual situation: The Salem Fire District was created by election July 17, 1973. The election was ordered on May 11, 1973. The board of a fire protection district is required by Sections 321.240-250, RSMo 1969, to fix its rate of levy by May 15 of each year and to certify such rate to the county governing body in order for the county court to levy the fire district tax "at the time required by law for levy of taxes for county purposes." Under the Jackson County Charter that latter date is August 31. The board, of course, did not exist and could not possibly have existed by May 15, 1973. In August, however, the newly elected board certified a rate of levy, and a tax was levied and collected for the full year 1973.

The pertinent provisions of Missouri law, Sections 321.240 and 321.250, RSMo 1969, provide as follows:

Honorable Howard E. Hines

on the one hundred dollars valuation, in addition to the rate which the board may levy under this section, by submitting the following question to the voters at any election in such district at which a member of the board of directors is to be elected:

OFFICIAL BALLOT

Instructions to voters:

Place an (X) in one square.

Shall the Board of Directors of _____ Fire Protection District be authorized to increase the annual tax rate from _____ cents to _____ cents on the hundred dollars assessed valuation?

☐

AGAINST THE TAX INCREASE

☐

FOR TAX INCREASE

and in addition thereto, to fix a rate of levy which will enable it to promptly pay in full when due all interest on and principal of bonds and other obligations of the district, and to pay any indebtedness authorized by a vote of the people as provided in this chapter; and in the event of accruing defaults or deficiencies in the bonded or contractual indebtedness, an additional levy may be made as provided in section 321.260."
(Section 321.240)

"On or before the fifteenth day of May of each year, the board shall certify to the county court of the county within which the district is located a rate of levy so fixed by the board as provided by law, with directions that at the time and in the manner required by law for levy of taxes for county purposes such county court shall levy a tax at the rate so fixed and determined upon the assessed valuation of all the taxable tangible property within the district, in addition to such other taxes as may be levied by such county court." (Section 321.250)

Honorable Howard E. Hines

Your question actually raises two issues. The first is whether it was proper for the fire protection district to tax property within the district for a full year, although the district did not exist as a political entity for the entire year. In Long v. City of Independence, 229 S.W.2d 686 (Mo. 1950), the Supreme Court of Missouri held that a city could apply property taxes to annexed property for a full year even though the property was annexed to the city after the year had begun. That situation was analogous to the one presented here. We believe that a newly created political entity has the same right to tax its property for a full year (in the year of its creation) as an existing entity which gains new property during a year. This is true even though the assessment for that year's tax is to be based on the value of the property as of January 1. The tax itself is incurred as of the date of its levy, so that property which is located in the district on the date of levy can be taxed by the district.

Therefore, we conclude that the tax at issue here would not be void as retrospective. The case of In re Armistead, 245 S.W.2d 145 (Mo. 1952), which dealt with the intangible tax and held that tax void as retrospective in the first year of its application, does not require a contrary result even though it was decided after the Long case. The Armistead case did not purport to overrule or question Long, and the intangible personal property tax which it involved is different in nature from a tax on real property; the intangible personal property tax is based upon the yield of intangible personal property during the entire year preceding the year of the tax. On the other hand, a real property tax is based upon the value of the property rather than its yield.

The second, and more difficult, issue here is whether the provisions of Sections 321.240 and 321.250 prohibit the imposition of the tax whose rate of levy was certified by the board of the Salem Fire District in August, 1973. These statutes do not specify any consequences or penalties for fire protection districts whose boards fail to certify their rate of levy by May 15 of any year. We believe that the May 15 deadline for certification of the rate of levy is merely directory and not mandatory. Its purpose seems to be only the encouragement of diligence on the part of the board of a fire protection district in certifying its rate of levy.

Section 321.250 makes clear that the tax is only to be levied by the governing body of the county "... at the time and in the manner required by law for levy of taxes for county purposes. . ." In light of this provision, the mere failure of the fire protection district's board to certify the levy by May 15 would not prejudice any vested rights of the district's taxpayers, nor prevent the levy of the district's taxes on August 31.

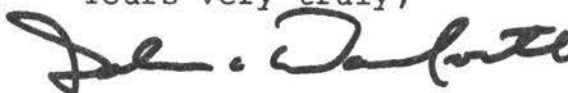
Honorable Howard E. Hines

CONCLUSION

Therefore, it is the opinion of this office that taxes may be levied by the governing body of a county on behalf of a fire protection district at the time required by law for levy of taxes for county purposes, whether or not the board of such district has certified its rate of levy to the county governing body by May 15. The tax may be imposed for a full year, although the district in question was formed after January 1.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mark D. Mittleman.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

January 23, 1974

OPINION LETTER NO. 103



Honorable Phil H. Snowden
State Representative, 20th District
c/o House Post Office
State Capitol Building
Jefferson City, Missouri 65101

Dear Representative Snowden:

This letter is in answer to your question asking:

"If a legislator is a sole proprietor in the practice of law and shares office space, secretaries and other expenses with other attorneys is the legislator in violation of Article III Section 12 of the Missouri Constitution, any other section of the Constitution or Statutes of the State of Missouri; if one or more of the other attorneys holds a lucrative office or employment or performs legal services for the United States, this state or any municipality or any subdivision thereof?"

In our Opinion No. 295, dated December 19, 1973, to Bradshaw, copy enclosed, we reiterated and summarized our views respecting violations of Section 12 of Article III of the Missouri Constitution when the legislator's partners, associates or lawyers or firm employees are involved in such employment.

It is our view, however, that the situation you present is clearly distinguishable. Where the legislator is a sole proprietor in the practice the mere fact that other attorneys with whom

Honorable Phil H. Snowden

he shares office space and the like may be employed by the United States, this state, or any municipality or any subdivision thereof, does not put the legislator in violation of such constitutional provision.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. Ltr. No. 295
12-19-73, Bradshaw

DEPUTIES: The amount of compensation to be allowed
COUNTY CLERKS: a county clerk in a third class county
COMPENSATION: to employ deputies and assistants under
 Section 51.450, RSMo 1969, is determined
by compensation of the county clerk as provided in Section 51.300,
RSMo Supp. 1973, and the compensation provided under Section 51.
310, RSMo Supp. 1973, is not included.

OPINION NO. 105

February 13, 1974

Honorable John W. Briscoe
Prosecuting Attorney
Ralls County
429 South Main Street
New London, Missouri 63459



Dear Mr. Briscoe:

This is in response to your request for an opinion from this office as follows:

"Section 51.450 (2) R.S.Mo. 1969, provides that the Clerk of the County Court in a third class county is entitled to employ deputies and assistants and is allowed to pay them 65% of his salary in counties with a population of 7500 and less than 15,000. That is the classification in which Ralls County falls. Section 51.310 R.S.Mo. 1969, provides that the County Clerk shall receive additional compensation of \$1,500.00 per annum for his duties in regard to voter registration. My question is whether Section 51.450 requires that the Clerk of the County Court be allowed \$975.00 (65% of \$1,500.00) as additional compensation for his deputies and assistants because of the provisions of Section 51.310."

Ralls County is a third class county.

Section 51.300, RSMo Supp. 1973, provides for compensation of the county clerk in each county of second, third, and fourth class based upon the population of the county and the assessed valuation of the county.

Section 51.310, RSMo Supp. 1973, to which you refer, provides as follows:

Honorable John W. Briscoe

"For the performance of the duties imposed by section 51.121 the county clerk shall receive, in addition to all other compensation provided by law, fifteen hundred dollars per annum, except that this section shall not apply to counties of the first class not having a charter form of government."

Subsection 1 of Section 51.450, RSMo 1969, with respect to the compensation that is to be allowed to such county clerks for deputies and assistants in third class counties provides in part:

"(2) In counties with a population of seven thousand five hundred, and less than fifteen thousand, the sum of sixty-five percent of the salary of the county clerk;"

Subsection 4 of Section 51.450, RSMo, provides:

"For the purpose of computing the various amounts under the provisions of subsection 1, the total compensation provided in section 51.300, RSMo, shall be considered the salary of the clerk of the county court."

It is our view that under Section 51.450, subsection 4, the amount of compensation to be allowed a county clerk in a third class county under subsection 1 for deputies and assistants is determined by the compensation provided for in Section 51.300 and that the provision for additional compensation to the county clerk under Section 51.310 is not to be included.

CONCLUSION

It is the opinion of this office that the amount of compensation to be allowed a county clerk in a third class county to employ deputies and assistants under Section 51.450, RSMo 1969, is determined by compensation of the county clerk as provided in Section 51.300, RSMo Supp. 1973, and the compensation provided under Section 51.310, RSMo Supp. 1973, is not included.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,



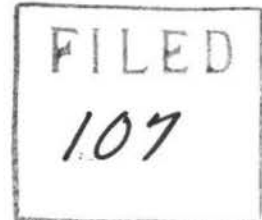
JOHN C. DANFORTH
Attorney General

BONDS: The notice requirements for special school
SCHOOLS: elections set out in Section 162.061, RSMo
ELECTIONS: 1969, are satisfied by official notices pub-
NOTICES: lished twenty-five and eighteen days before
 an election.

OPINION NO. 107

February 14, 1974

Honorable Flavel J. Butts
Representative, District 132
Room 235A, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Butts:

This official opinion is in response to your request for a ruling on the following question:

"Is the notice of a special bond election held November 20, 1973, given pursuant to Section 162.061, RSMo. (1969), valid if it was published October 26, 1973, and November 2, 1973, such notice having been published for two consecutive weeks with both publications being more than fifteen days prior to the date of the election?"

You have furnished this office with the following factual background to your question:

"A special bond election was held in Camdenton Reorganized School District No. R-3 of Camden County, Missouri on November 20, 1973. The election was called pursuant to Section 164.121, RSMo. (1969), which provides that notice of election shall be given in the manner provided by Section 162.061, RSMo. (1969). Notice of the election was published in a weekly newspaper of general circulation in the school district for two consecutive weeks, the first publication being on October 26, 1973, and the last publication being on November 2, 1973. Section 162.061 provides that published notice of a special election shall be given '...once a week for two consecutive weeks, the first publication to be at least fifteen

Honorable Flavel J. Butts

days before and the last publication to be at least seven days before the date of the election...'

"This section does not provide any minimum time preceding an election, when the last publication must be run. The absence in Section 162.061, of a minimum time next preceding an election when the last publication must be run gives rise to the question presented under paragraph 3 of this request."

Section 162.061, RSMo 1969, reads as follows:

"Unless otherwise prescribed by this law notice of any special election or meeting in any school district or of any proposal to be voted on at an annual election or meeting, when required by law, shall be in writing and shall be given either by posting written notices in at least five public places within the district at least fifteen days before the meeting or election, or by publishing the notice in a newspaper within the county in which all or a part of the district is located which has general circulation within the district, once a week for two consecutive weeks, the first publication to be at least fifteen days before and the last publication to be at least seven days before the date of the election or meeting. The method of giving notice shall be determined by the school board of the district by an order entered on the records of the district. Each notice shall contain a brief statement of the questions or proposals to be voted on at the election or meeting."
(Emphasis added)

We shall assume that all other requirements set out in this statute relating to the content of the notice and the place and method of publication have been met, and that the only question is whether the dates of publication--twenty-five and eighteen days before the election--were within the times provided by the statute.

The traditional rule in Missouri has been that the requirements for the time and quantity of notice for special elections will be strictly enforced, and an election will be set aside if too little notice was given. State ex rel. City of Berkeley v. Holmes, 219 S.W.2d 650 (Mo.Banc 1949); American Legion Phillips

Honorable Flavel J. Butts

Post v. City of Malden, 330 S.W.2d 189 (Spr.Ct.App. 1959); but see State ex rel. Boyer v. Whittle, 401 S.W.2d 401 (Mo. 1966).

Section 162.061 provides that notice of a special school election must be published for two consecutive weeks when notice is given by publication in a newspaper, the first publication being at least fifteen days before the election and the second at least seven days before the election. These minimum periods are designed to assure that all voters learn of an upcoming election in enough time to investigate and discuss the issues involved, and so that all voters may plan their affairs so that they may vote at the election.

Although the law requires notice at least a week before the election, it does not explicitly provide the earliest date notice may be published; that is, any notice published more than fifteen and seven days before the election is within the literal terms of the statute. We do not interpret this, however, to allow publication of notice six months or a year before the election. Considering the purposes of statutory notice, we believe that the publication of notice must occur within a reasonable length of time before the election where the statute is not more specific. Naturally, the closer to the election, the better, so long as the minimum periods are observed, but any attempt to interpret Section 162.061 as requiring the second notice to appear during the week ending the seventh day before the election would be unduly narrow and technical. Rather, a rule of reason should be applied based on the facts of each case.

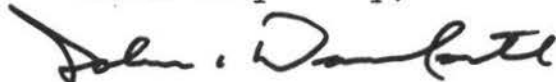
In the situation involved here, both publications of notice occurred during the month before the election, and the second publication was only eighteen days before the voting took place. We believe that this schedule gave adequate notice and did not represent an unreasonable period of time during which the election might be forgotten by the voters.

CONCLUSION

It is, therefore, the opinion of this office that the notice requirements for special school elections set out in Section 162.061, RSMo 1969, are satisfied by official notices published twenty-five and eighteen days before an election.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Richard E. Vodra.

Yours very truly,



JOHN C. DANFORTH
Attorney General

CRIMINAL PROCEDURE:
CIRCUIT CLERK:
SUNSHINE BILL:

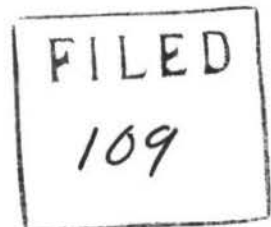
1. All records pertaining to the case of a defendant who has been nolle prossed, dismissed, or found not guilty in the court in which

the action is prosecuted, and not merely the name of the defendant, must be removed from the records of the trial court which are available to the public, and must be kept in separate records which are to be held confidential. Where possible, pages of the public records should be retyped or rewritten, omitting those portions of the records which deal with such a defendant's case; however, where retyping or rewriting is not feasible because of the permanent nature of the record book, such record entries may be "blacked out" and recopied in a confidential record book. But the records of an appellate court which reverses a conviction and remands the case to the trial court are not to be closed, even if the case is nolle prossed, dismissed, or results in a finding of not guilty on remand. 2. The obligation to advise persons and agencies holding records pertaining to the case of a defendant who has been nolle prossed, dismissed, or found not guilty, rests upon those who are aware that such persons and agencies possess such records, and who are aware of the outcome of the case. Primarily this responsibility devolves upon the prosecuting attorney. 3. Law enforcement agencies are required to maintain confidential records of matters which are required to be closed, as well as the public records which such agencies maintain on all other matters.

OPINION NO. 109

March 25, 1974

Honorable A. J. Seier
Prosecuting Attorney
Cape Girardeau County
721 North Sunset
Cape Girardeau, Missouri 63701



Dear Mr. Seier:

This official opinion is issued in response to your request for a ruling on the following questions:

"In order to comply with Section 7 of Senate Bill No. 1, 77th General Assembly [1973], we assume that some method must be devised to maintain the record entries so that they will be available to a defendant but preclude the name of the defendant who was charged, but

Honorable A. J. Seier

was subsequently nolle prossed, dismissed or found not guilty being available to the public. May a Clerk 'black out' the name of the defendant in all indices and permanent records, but create a confidential index so that the name of the defendant is no longer public, while still retaining the capability of finding the record for the defendant? May the Clerk retype or rewrite all pages on which the name of a defendant appears, deleting such name, and make a confidential record of all such entries so that the entries would not be available to the public, but still available to the defendant? Does the Clerk of the Court, or anyone else, have an obligation to advise law enforcement officials that a case was nolle prossed, dismissed or that the defendant was found not guilty? Are the law enforcement agencies authorized to have two types of records, those that are public and those, formerly public, that are now confidential?"

You refer to what is now Section 610.105, RSMo Supp. 1973.

You state the following facts in conjunction with this request: When a criminal case is filed in the Circuit Court of Cape Girardeau County, the style of the case is placed in an alphabetical index, which is a permanently bound volume. An entry is made in the daily minute book which, thereafter, is transferred to a permanent record book. A docket sheet is prepared, as well as a fee bill. Bail bonds are recorded. A permanent index, which ultimately will be an index to all entries on a case, is begun. Entries concerning several different cases will appear on one page. The clerk does not make only one entry per page. As the case progresses, other entries will be made in the daily and permanent record books, and ultimately in a judgment book. Thus, a defendant's name may appear in the records many times, depending on the number of motions filed and hearings conducted.

Section 610.105 provides:

"If the person arrested is charged but the case is subsequently nolle prossed, dismissed or the accused is found not guilty in the court in which the action is prosecuted, official records pertaining to the case shall thereafter be closed records to all persons except the person arrested or charged."

Honorable A. J. Seier

In our Opinion 311, issued November 30, 1973, to Ralph L. Martin, a copy of which is attached thereto, we held that records which are required to be closed under Section 7 are not to be expunged (that is, physically destroyed), but they are to be available to courts and law enforcement agencies only for purposes of litigation and otherwise must be inaccessible to the general public. We pointed out there and in our Opinion 299, issued September 28, 1973, to Theodore D. McNeal and Curtis Brostron, that Senate Bill 1, 77th General Assembly (1973) refers both to closing and to expungement, and that the former term implies a less stringent requirement than the latter. We enclose a copy of Opinion 299.

You have referred to the possibility of "blacking out" from indices and permanent records the name of a defendant who was charged, but subsequently nolle prossed, dismissed or found not guilty. We believe that the terms of Section 7 are sufficiently broad to require something more than the mere concealment of the defendant's name. The statute requires that "official records pertaining to the case" are to be closed. As we pointed out in our Opinion 311, supra, Section 7 applies to all records pertaining to the case, including the records of courts, prosecuting attorneys, and other law enforcement agencies. Moreover, there is a practical reason why merely "blacking out" the name of the defendant would not be sufficient under the statute: the public might be able to determine the defendant's identity from the context of the record entries.

"Blacking out" the name of the defendant, or even the entire record pertaining to the defendant, appears to be an act of expungement, although the distinction between closing and expungement would be properly preserved if a confidential index and record were created so that the record could still be found for the defendant and for courts and law enforcement agencies requiring it for purposes of litigation. We think the solution of retyping or rewriting pages on which records pertaining to the defendant's case appears, omitting all his records therefrom and retyping or rewriting them for inclusion in confidential record books, is the best solution where practical. However, where the records are kept in permanently bound volumes, it appears that the only practical solution would be to "black out" everything in such volumes pertaining to the defendant's case and to copy over those entries in a separate volume which is to be kept confidential.

Where a defendant has been convicted in the trial court, but his conviction is reversed and remanded, and his case is subsequently nolle prossed or dismissed or he is found not guilty

Honorable A. J. Seier

upon retrial, the trial court must close all records pertaining to the case, including records of the original trial. But appellate court records of the appeal will not have to be closed in the manner we have outlined above. This is because of the provisions of Article V, Section 12 of the Constitution of Missouri, as amended effective January 1, 1972:

"The opinions of the supreme court and court of appeals and all divisions and districts of said courts shall be in writing and filed in the respective causes, and shall become a part of the records of the court and be free for publication."

Insofar as Section 610.105 conflicts with this provision, it is unconstitutional. Thus, the fact that a case is nolle prossed or dismissed or the accused found not guilty, on remand to the trial court from the Supreme Court or the Court of Appeals, could not subject the appellate court's opinion to closing under Section 610.105. To that extent, the record of the defendant's prosecution would remain open to the public.

Moreover, it would be useless and unreasonable to require the appellate court to close any other record entries it has made pertaining to the case; the purpose of closing records of the appeal to the public could not be served thereby, since the court's opinion would still be public. As we pointed out in Opinion 299, supra, the law favors constructions which harmonize with reason and which avoid absurd or unreasonable results. Therefore, none of the reversing appellate court's records need be closed, although the trial court's records pertaining to the case must be closed.

Your next question asks whether anyone has an obligation to advise law enforcement officials that a case was nolle prossed, dismissed, or resulted in a finding of not guilty. Nothing in Section 610.105 directly imposes such an obligation on any person. However, as we pointed out above, the records of law enforcement agencies as well as those of courts are to be closed upon nolle prosequi, dismissal, or a finding of not guilty. Clearly the law enforcement agencies cannot close their records unless they are informed of the outcome of the case.

The statute gives us little guidance in this matter, but we believe that the most sensible procedure is to place the responsibility (for informing law enforcement officials of the outcome of the case) upon those persons who are most likely to know the identity of the pertinent law enforcement agencies.

Honorable A. J. Seier

Ordinarily, this would mean the prosecuting attorney, who would of course be aware of all the court's rulings. However, if the law enforcement agencies he notifies of the disposition of the case are aware of other agencies which also have records pertaining to the case, they should inform such other agencies themselves.

In light of what we said in answer to your first two questions, it should be obvious that law enforcement agencies, as well as courts, are not only authorized but required to have two types of records - those that are open to the public and those which must be kept confidential once the requirements of Section 610.105 apply to them - that is, when a case is nolle prossed, dismissed, or results in a finding of not guilty.

CONCLUSION

Therefore, it is the opinion of this office with respect to Section 610.105, RSMo Supp. 1973, that:

1. All records pertaining to the case of a defendant who has been nolle prossed, dismissed, or found not guilty in the court in which the action is prosecuted, and not merely the name of the defendant, must be removed from the records of the trial court which are available to the public, and must be kept in separate records which are to be held confidential. Where possible, pages of the public records should be retyped or rewritten, omitting those portions of the records which deal with such a defendant's case; however, where retyping or rewriting is not feasible because of the permanent nature of the record book, such record entries may be "blacked out" and recopied in a confidential record book. But the records of an appellate court which reverses a conviction and remands the case to the trial court are not to be closed, even if the case is nolle prossed, dismissed, or results in a finding of not guilty on remand.

2. The obligation to advise persons and agencies holding records pertaining to the case of a defendant who has been nolle prossed, dismissed, or found not guilty, rests upon those who are aware that such persons and agencies possess such records, and who are aware of the outcome of the case. Primarily this responsibility devolves upon the prosecuting attorney.

3. Law enforcement agencies are required to maintain confidential records of matters which are required to be closed, as well as the public records which such agencies maintain on all other matters.

Honorable A. J. Seier

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mark D. Mittleman.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent.

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 311
11-30-73, Martin

Op. No. 299
9-28-73, McNeal

CRIMINAL LAW:
CRIMINAL PROCEDURE:
CONTROLLED SUBSTANCES:
NARCOTICS:
DRUGS:

The expungement of records authorized by Section 195.290, RSMo Supp. 1971, requires the physical destruction of such records.

OPINION NO. 111

February 4, 1974

Honorable Kenneth J. Rothman
State Representative, 77th District
Room 309, State Capitol Building
Jefferson City, Missouri 65101



Dear Representative Rothman:

This official opinion is issued in response to your request for a ruling on the following question:

"Under RSMo 195.290 1971 Supp. dealing with the expungement of criminal records, does expunge mean to remove from the files and place in a non-public file, or does it mean to physically destroy?"

You state that several judges have taken the position that physical destruction of an expunged record is not required, and that one judge has placed a record in his safe in order to prevent it from being made available to the public.

Section 195.290, RSMo Supp. 1971, provides as follows:

"After a period of not less than six months from the time that an offender was placed on probation by a court, such person, who at the time of the offense was twenty-one years of age or younger, may apply to the court which sentenced him for an order to expunge from all official records, except from those records maintained under the comprehensive drug abuse prevention and control act, as enacted in 1970, and all recordations of his arrest, trial and conviction. If the court determines, after a hearing and after reference to the controlled dangerous substances registry,

Honorable Kenneth J. Rothman

that such person during the period of such probation and during the period of time prior to his application to the court under this section has not been guilty of any offenses, or repeated violation of the conditions of such probation, he shall enter such order. The effect of such order shall be to restore such person, in the contemplation of the law, to the status he occupied prior to such arrest and conviction. No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest or trial or conviction in response to any inquiry made of him for any purpose."

These provisions, of course, refer to offenses for violation of the Drug Regulations or Controlled Substances Act, Sections 195.010 through 195.320, RSMo Supp. 1971.

In our Opinion No. 299, issued September 28, 1973, to Theodore D. McNeal and Curtis Brostron, we stated as follows:

". . . Black's Law Dictionary, Fourth Edition, defines 'to expunge' as 'to destroy or obliterate; it implies not a legal act, but a physical annihilation.' Webster's New World Dictionary of the American Language, College Edition, defines 'expunge' as 'to blot, wipe, or strike out; erase; delete; cancel; efface.' The clear meaning of the word, then, implies physical destruction of the records. . . ."

We enclose a copy of Opinion No. 299.

We cited this meaning for the word "expunge" in the context of Senate Bill No. 1, 77th General Assembly (1973). However, we see no reason to believe that the meaning of the word "expunge" in Section 195.290, RSMo Supp. 1971, is different. Nothing in the terms of Section 195.290 implies that the requirement of expungement can or should be met by segregation of certain records from other records which are accessible to the public, nor by any other disposition of records short of their physical destruction.

Honorable Kenneth J. Rothman

CONCLUSION

Therefore, it is the opinion of this office that the expungement of records authorized by Section 195.290, RSMo Supp. 1971, requires the physical destruction of such records.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mark D. Mittleman.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a stylized "D".

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 299
9-28-73, McNeal

ELECTIONS: With respect to cities and counties which are
PRECINCTS: required to maintain a system of voter regis-
COUNTY CLERK: tration under Sections 114.011-114.146, RSMo
Supp. 1973: 1. Absent a specific statutory
provision to the contrary, a political subdivision conducting an
election may have a polling place outside the boundaries of the
political subdivision, provided that there is one polling place
in each precinct in the political subdivision. 2. Any time two
or more political subdivisions overlap within the same precinct
and conduct elections on the same day, they must select a common
polling place within the precinct, and the county clerk must pro-
vide the precinct registration records at the place so designated.
If the political subdivisions involved cannot agree on a common
polling place, the county clerk shall designate the polling place
for the political subdivisions. 3. If two or more political sub-
divisions within an established precinct have an election on the
same day and the districts do not overlap, the common polling
place may, if necessary, be located beyond the political bound-
aries of one or more of the subdivisions; and to the extent that
Section 162.371 or any other similar statute is to the contrary,
it is deemed to have been implicitly repealed by Sections 114.011-
114.146. If the political subdivisions involved cannot agree on
a common polling place, the county clerk shall designate the poll-
ing place for the political subdivisions.

OPINION NO. 114

March 13, 1974

Honorable James C. Kirkpatrick
Secretary of State
Room 209, Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

This official opinion is issued in response to your request for a ruling on the following questions relating to the effect of SSHCSHB No. 20, 77th General Assembly, First Regular Session (Sections 114.011-114.146, RSMo Supp. 1973), on the election laws of Missouri.

We will confine our discussion to those cities and counties where elections are governed by Sections 114.011-114.146, that is, those counties and cities which do not have boards of election commissioners. With this qualification, we answer your questions as follows, in the order in which you asked them.

Your first question is as follows:

Honorable James C. Kirkpatrick

"1. May a political subdivision conducting an election have a polling place outside the boundaries of the political subdivision so long as there is one polling place within each precinct of the political subdivision?"

Section 114.116 directs how election districts or precincts are to be established in all counties and cities of the state, except those which have boards of election commissioners. That section provides:

"1. Election districts or precincts for that part of the county outside the corporate limits of any city, town or village, which for municipal election purposes is subject to the provisions of sections 114.011 to 114.146 shall be set by the county court. The election precincts for that part of the county within any city, town or village, which for municipal election purposes is subject to the provisions of sections 114.011 to 114.146 shall be set by the governing body of the city, town or village or by the municipal election authority, whichever the case may be.

"2. No election precinct established in any city, town or village, which for municipal election purposes is subject to the provisions of sections 114.011 to 114.146, shall encompass territory outside the corporate limits of the city, town or village, nor shall such precinct encompass territory in more than one county."

Thus, although paragraph (2) of Section 114.116 prohibits a precinct in any city, town or village from encompassing territory beyond the corporate limits of that city, town or village, or from encompassing territory in more than one county, it does not prohibit a precinct from overlapping other types of political subdivisions (such as fire protection districts, school districts, etc.).

It is, of course, necessary that one polling place be established within each precinct. As this office pointed out in our Opinion No. 116, 1974, issued to the Honorable James C. Kirkpatrick, that conclusion is required by the very definition of the word "precinct." See Opinion No. 116, page 4.

It is our opinion, then, that nothing contained in Section 114.116, or any other section of SSHCSHB No. 20 ordinarily would

Honorable James C. Kirkpatrick

prevent a political subdivision from having a polling place outside its boundaries, provided one polling place is located within each precinct established pursuant to Section 114.116. In other words, a voter may be required to cast his ballot at a polling place outside the boundaries of the political subdivision in which he resides, but not outside the boundaries of his precinct.

However, certain statutes require that polling places be designated within the particular political subdivision. For example, Section 162.371, RSMo 1969, which deals with school district elections, provides in pertinent part:

" . . . Convenient polling places within the district shall be designated by the board for all elections. If there is more than one incorporated city or town within the school district, there shall be at least one polling place in each city or town. When a district includes any city, incorporated town or other political subdivision which holds an election on the same day on which the school election is held, the county clerk, board of election commissioners or other official having authority over general elections in the city, town, political subdivision and school district shall designate one polling place for both the school district and the city, town or political subdivision election in each precinct or district within the city, town or political subdivision and shall designate the election officials in each precinct who shall conduct the election for all subdivisions involved. The board of education shall designate polling places for voters who reside outside the corporate limits of cities, towns or other political subdivisions which hold elections at the same time as school elections." (Emphasis added).

Where such a provision exists, it will normally be controlling if no other political subdivision within the precinct is conducting an election on the same day. A different situation, however, may result where two or more political subdivisions within one precinct are holding an election on the same day. This brings us to your second and third questions. You ask:

"2. If two political subdivisions within an established precinct have an election on the

Honorable James C. Kirkpatrick

same day, and the districts do not overlap, may the county clerk assist the subdivisions in choosing a mutually agreed upon polling place, and provide the precinct binder to both subdivisions at that polling place, even if it is outside the political boundaries of one or more of the districts?

"3. How does a county clerk comply with the provisions of SSHCSHB 20 requiring him to provide binders to political subdivisions if two or more subdivisions are having elections on the same day and encompass the same territory?

"Does a county clerk comply with statutory requirements if he furnishes both subdivisions with the precinct books at a common polling place decided upon by the subdivisions?"

The statutory scheme outlined by Sections 114.011-114.146 clearly contemplates and requires that there be only one polling place per precinct. See Opinion No. 116, pages 6-7. Therefore, whenever two political subdivisions overlap within the same precinct and conduct an election on the same day, the subdivisions must choose a common polling place within the precinct; and the county clerk may assist the subdivisions in making this selection. In the event the various subdivisions within the precinct are unable to agree upon a common polling place, the county clerk must designate a polling place as the single location to which he will send the registration records for each precinct, as required by Section 114.051(2).

Furthermore, if two or more political subdivisions conduct an election on the same day and their boundaries do not overlap, it is clear that to prohibit the establishment of polling places beyond the boundaries of the respective political subdivisions would necessitate the establishment of more than one polling place within the same precinct. This, as we have already pointed out, is neither feasible nor permissible in view of the requirements of Sections 114.011-114.146. Therefore, it is our view that Section 162.371, or any similar statutory provisions requiring voting within the boundaries of particular subdivisions, are impliedly repealed to the extent that they conflict with Sections 114.011-114.146.¹ See Opinion No. 116.

¹In some cases there may be no conflict. For example, assume a school district and another political subdivision located within

Honorable James C. Kirkpatrick

In reaching this conclusion, we are aware that repeal by implication is not favored in the law. See Opinion No. 116, page 4. Nor are we ignoring the disclaimer contained in Section 114.136, which provides that all provisions regulating elections shall remain in effect ". . . except as modified by the provisions of sections 114.011 to 114.146." (emphasis added). However, it seems to us that the use of the phrase "except as modified" clearly indicates a legislative recognition that certain previously existing laws pertaining to elections would, in fact, be altered or amended by Sections 114.011-114.146.

In the event the various subdivisions within the precinct are unable to agree upon a common polling place, the county clerk must designate a polling place as the single location to which he will send the registration records for each precinct, as required by Section 114.051(2).

CONCLUSION

Therefore, it is the opinion of this office that, with respect to cities and counties which are required to maintain a system of voter registration under Sections 114.011-114.146, RSMo Supp. 1973:

1. Absent a specific statutory provision to the contrary, a political subdivision conducting an election may have a polling place outside the boundaries of the political subdivision, provided that there is one polling place in each precinct in the political subdivision.

2. Any time two or more political subdivisions overlap within the same precinct and conduct elections on the same day, they must select a common polling place within the precinct, and the county clerk must provide the precinct registration records at the place so designated. If the political subdivisions involved cannot agree on a common polling place, the county clerk shall designate the polling place for the political subdivisions.

3. If two or more political subdivisions within an established precinct have an election on the same day and the districts

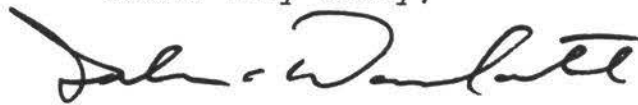
the same precinct conduct elections on the same day and assume their boundaries do not overlap. Assume, no special statute exists which would prevent the other political subdivision from having a polling place outside its territory. Under those circumstances, the requirements of Sections 114.011-114.146 and Section 162.371 will be complied with by locating the polling place in that part of the school district's territory which is located within the precinct.

Honorable James C. Kirkpatrick

do not overlap, the common polling place may, if necessary, be located beyond the political boundaries of one or more of the subdivisions; and to the extent that Section 162.371 or any other similar statute is to the contrary, it is deemed to have been implicitly repealed by Sections 114.011-114.146. If the political subdivisions involved cannot agree on a common polling place, the county clerk shall designate the polling place for the political subdivisions.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Philip M. Koppe.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

ELECTIONS:
COUNTY CLERK:

Section 111.111, RSMo 1969, applies only to situations where a general, primary or special election of the state or a county and an election by a political subdivision are held on the same day.

OPINION NO. 115

March 13, 1974

Honorable James C. Kirkpatrick
Secretary of State
Room 209, Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

This official opinion is issued in response to your request for a ruling on the following question:

"Does Section 111.111 apply in any situation where there is more than one election held in a county on a given day?"

Paragraph 1 of Section 111.111, RSMo 1969, reads as follows:

"Notwithstanding any other provisions of law, whenever any general, primary or special election and elections held by a school, fire or sewer district, municipality or other political subdivision are held on the same day, the county clerk, board of election commissioners or other official having authority over general elections shall designate one polling place for the several elections in each precinct or district in the political subdivision in which the elections are held."
(Emphasis added).

Your question asks, in effect, whether Section 111.111 automatically applies any time there is more than one election held in a county on a particular day, regardless of the type of elections so held. This question, we believe, is answered by Opinion No. 181 dated May 18, 1970, and issued to the Honorable M. C. Bauer. That opinion held that Section 111.111 is specifically applicable only when a political subdivision of the state submits a question to the electorate on the same day a state or county

Honorable James C. Kirkpatrick

general, primary or special election is held. This conclusion was reaffirmed in Opinion No. 210 dated June 2, 1970, and issued to Thomas R. Gilmore.

We have carefully examined the language of Missouri's new voter registration act, SSHCSHB No. 20, 77th General Assembly (Sections 114.011-114.146, RSMo Supp. 1973), and have found nothing within its provisions that would compel us to reach a conclusion different from that of our previous opinions.

CONCLUSION

It remains, therefore, the opinion of this office that Section 111.111, RSMo 1969, applies only to situations where a general, primary or special election of the state or a county and an election by a political subdivision are held on the same day.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Philip M. Koppe.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" and last name "Danforth" clearly distinguishable.

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 181
5-18-70, Bauer

Op. No. 210
6-2-70, Gilmore

ELECTIONS:
CITY ELECTIONS:
PRECINCTS:
ELECTION JUDGES:

With respect to cities and counties which are required to maintain a system of voter registration under Sections 114.011 - 114.146, RSMo Supp. 1973: 1. A city may design-

nate election precincts pursuant to Section 114.116, RSMo Supp. 1973, without regard to the ward boundaries of such city, and may make the entire city one voting precinct; but a city located in more than one county must establish at least one election precinct in each such county. 2. A political subdivision encompassing more than one precinct, or parts of more than one precinct, must establish a polling place within each such precinct when conducting an election, except where the political subdivision is specifically entitled by law to consolidate precincts for that election and such consolidation will not interfere with the precinct system of voting in any other political subdivision which conducts an election on the same day. 3. In cases where there are not sufficient voters in a precinct to staff a polling place, an election conducted by less than the number of statutorily required officials is valid. If no one can be found in that part of a political subdivision within a precinct who will serve as an election official, election officials may be appointed for such precinct from elsewhere in the political subdivision.

OPINION NO. 116

March 13, 1974

Honorable James C. Kirkpatrick
Secretary of State of Missouri
State Capitol Building
Jefferson City, Missouri 65101



Dear Secretary Kirkpatrick:

This official opinion is issued in response to your request for a ruling on several questions relating to the effect of SSHCSHB 20, Seventy-Seventh General Assembly (Sections 114.011 - 114.146, RSMo Supp. 1973), on the election laws of Missouri.

Your first question is as follows:

"May a city designate precincts without regard to ward boundaries, including making the entire city one voting precinct, or must each ward be designated a precinct?"

Honorable James C. Kirkpatrick

It is important to keep in mind the distinction between a "precinct," as that term is used in Sections 114.011 - 114.146, and a "ward." The word "precinct" has been defined in 29 C.J.S., Elections, Section 1 (10) (c), p. 27, to mean "a compact geographical unit for voting purposes in which a single polling place is located." It does not refer to a political unit.

On the other hand, the term "ward," insofar as it has any legal significance with respect to elections (e.g., Sections 77.030, 79.060, 81.070, 82.170, RSMo 1969), refers to a portion of a city specifically accorded representation by elected officials.

Section 114.116, RSMo Supp. 1973, provides as follows:

"1. Election districts or precincts for that part of the county outside the corporate limits of any city, town or village, which for municipal election purposes is subject to the provisions of sections 114.011 to 114.146 shall be set by the county court. The election precincts for that part of the county within any city, town or village, which for municipal election purposes is subject to the provisions of sections 114.011 to 114.146 shall be set by the governing body of the city, town or village or by the municipal election authority, whichever the case may be.

"2. No election precinct established in any city, town or village, which for municipal election purposes is subject to the provisions of sections 114.011 to 114.146, shall encompass territory outside the corporate limits of the city, town or village, nor shall such precinct encompass territory in more than one county."

This statutory provision grants plenary authority to cities, towns and villages to establish election precincts within their corporate limits. While it contains certain restrictions upon the exercise of that power, it does not prohibit a city from designating precincts without regard to ward boundaries. Nor does it prohibit a city from establishing only one voting precinct to encompass all wards, unless the city's corporate boundaries include territory in more than one county, in which case separate precincts would have to be established for the portions of the city which lie within each county.

Honorable James C. Kirkpatrick

Section 95.145, RSMo 1969, provides as follows, however:

"For the purpose of testing the sense of the voters of any incorporated city, town, or village, whether organized under the general laws of this state or by special charter or by constitutional charter, upon a proposition to incur debt as authorized in sections 95.115 to 95.135, the council, board of aldermen or trustees, as the case may be, shall order an election to be held of which they shall give notice signed by the city clerk. Such notice shall be advertised by publication once a week for three consecutive weeks in a newspaper published in the city, town, or village, as the case may be. If there be no newspaper published in the city, town or village, then in a newspaper published in the county wherein is situate such city, town or village. If there are one or more daily newspapers published in such city, town or village which shall have been published continuously for fifty-two weeks next before publication of the notice is required to begin and shall have a bona fide circulation or sale therein of at least one thousand copies, such notice shall be published in at least one of such newspapers. The first publication of the notice shall be made at least twenty-one days before, and the last shall be within two weeks of the date of the election. Such election shall be held and judges thereof appointed as in case of other elections in such municipalities, except that the board of election commissioners of such city (if there be such a board) or other proper authorities having charge of such election shall provide at least one voting place in each ward of the municipality conducting such election (if there be more than one ward) and for that purpose they may combine as many election precincts in each ward as in their judgment may be proper. The judges and clerks of the precinct in which a voting place is located shall act as the judges and clerks of such election for such combined

Honorable James C. Kirkpatrick

precinct. Except as herein provided, such election shall be conducted in the same manner and by the same election commissioners (if there be such election commissioners) judges and clerks and other officers and employees as other elections are conducted." (Emphasis added.)

This statute appears to limit the power of municipalities to designate precincts, by requiring a voting place in each ward when such municipalities conduct bond elections. However, the precinct system established by Sections 114.011 - 114.146 is based on registration rather than voting; and, as we demonstrate in the second part of this opinion, voting places must follow the new system of registration by precincts. Thus, Section 95.145 conflicts with the general power to designate precincts for purposes of voter registration, now granted to municipalities by Section 114.116. To this extent we hold that it has been repealed by implication.

It is true that the implied repeal of statute by a later enacted statute, which does not explicitly repeal the earlier one, is not favored in the law. Nor is the repeal of a specific statute, such as Section 95.145, by a general one, such as Sections 114.011 - 114.146, favored, when it is possible to reconcile and harmonize the conflicting statutes by construction. The rule governing implied repeal has been held to require that "the two statutes are so repugnant that both cannot stand, and therefore the Legislature necessarily intended repeal, even though they did not expressly so provide." Kansas City Terminal Railway Company v. Industrial Commission of Missouri, 396 S.W.2d 678 (Mo. 1965). But in this instance, we believe that in fact such a stringent test has been met.

Your second question is as follows:

"Must a political subdivision encompassing more than one precinct establish a polling place within each precinct when conducting an election?"

The definition of "precinct" quoted above makes it obvious that a political subdivision encompassing more than one precinct (or parts of more than one precinct, since not all political subdivisions' boundaries will correspond precisely to the boundaries of precincts established under Section 114.116) must have a polling place within each such precinct. The comprehensive system of voter

Honorable James C. Kirkpatrick

registration established by Sections 114.011 - 114.146 is based upon registration by precincts. Moreover, Section 114.091 provides as follows:

"1. Any qualified voter who appears at the polls to vote at any election for which registration may be required, before procuring a ballot, shall identify himself and sign his name and address upon a certificate furnished the judges of election by the county clerk, which certificate shall contain the ward and precinct designation, together with any other appropriate information. The signature on the certificate shall be compared with the signature on the precinct record upon which the voter appears to be registered, and any question of doubt concerning the identity of the voter shall be decided by a majority of the judges. The voter's number, in the order in which it is received, shall be placed on the certificate by one of the judges of election together with the initials of the judge. The certificates shall be fastened together and shall constitute the poll list and shall be used in lieu of poll books. The certificate shall be returned to the office of the county clerk in a receptacle provided by the county clerk for that purpose and shall be preserved by the clerk for one year from the date of the election, unless otherwise directed by order of the circuit court. The precinct record on which the voter's name appears shall be marked 'voted' and initialed by the election judge together with the date of election in the appropriate place on the record.

"2. The judges of election shall permit no person to vote unless properly identified and registered as a resident of the precinct, except for the purposes of voting for presidential and vice-presidential electors in accordance with the provisions of chapter 111, RSMo. If during the hours of election the judges do not allow a person to vote because

Honorable James C. Kirkpatrick

of doubt as to his identity, that person may produce and deliver an affidavit to the judges, subscribed and sworn to by him before one of the election judges, in which it is stated how long he has resided in the precinct and the county, that he is a duly qualified, registered voter in the precinct and that he is the person so registered whose name is found in the record of the precinct. The affidavit shall be supported by the affidavit of two registered voters in the precinct, stating their residence and that they know the facts stated by him to be true of their own knowledge. If the name of the person is found in the record of the precinct in which he offers to vote, the vote of the person shall be received and counted as other votes.

"3. The judges of election shall be supplied with a sufficient number of affidavits in blank, which, in addition to the appropriate contents thereof, shall contain a warning to the judges that the affidavit shall not be used for any other purpose. The judges shall return each executed affidavit to the office of the county clerk with other election supplies and shall enter any appropriate information or comment under the title 'remarks', which shall appear at the bottom of the affidavit.

"4. The returning judge or any other judge responsible for the custody and return of all election supplies shall return all precinct registers, affidavits and other records required by this chapter to the office of the county clerk within a reasonable time after the close of the polls at any election and shall be responsible for any loss, mutilation or destruction of any records as may occur through any willful or negligent act on his part."

This procedure for voting cannot be carried out at any location or combination of locations, except at a single polling place

Honorable James C. Kirkpatrick

for each precinct in which the voters of a political subdivision may be registered. Section 114.051 permits only one registration book to be given to election judges in each precinct. A voter's signature cannot be compared with his registration record when he appears at the polls, as required by Section 114.091 (1), unless there is a single polling place where each precinct's registration book is sent. Thus, if a political subdivision encompasses more than one precinct (or parts of more than one precinct) established under Section 114.116, the political subdivision must establish a polling place within each such precinct when conducting an election.

If a political subdivision is permitted by law to "consolidate" precincts for its elections (e.g., Sections 95.145, 162.381, RSMo 1969), it may provide a single polling place to serve more than one such precinct. But, when more than one political subdivision within those precincts conducts an election on the same day, none of them may consolidate its precincts if doing so would require a transfer to the "consolidated" polling place of the registration records of any persons who are required to vote at their regular precinct polling places in the election for another political subdivision. To this extent, Sections 114.011 - 114.146 must necessarily be held to have repealed the authority to consolidate precincts contained in earlier enacted statutes.

" . . . [T]he law favors constructions which harmonize with reason, and which tend to avoid unjust, absurd, unreasonable or confiscatory results, or oppression. . . ." State ex rel. Stern Brothers and Company v. Stilley, 337 S.W.2d 934, 939 (Mo. 1960).

Your third question is as follows:

"How can a political subdivision encompassing more than one precinct comply with the requirements of Section 111.171, RSMo 1969, that an election judge must 'reside in the election district for which he is selected,' if the number of voters contained within a precinct is not sufficient to staff a polling place?"

Section 111.171 provides as follows:

"1. No person shall be qualified to act as judge or clerk of any registration or elec-

Honorable James C. Kirkpatrick

tion in this state unless he is legally entitled to vote at the next election following his appointment. He must be a person of good repute and character who can speak, read and write the English language. He must reside in the precinct, ward, township or election district for which he is selected to act. He must not hold any office or employment under the United States, the state of Missouri, or under the county, city, or other political subdivision involved in the election to be held at the time of his appointment. He must not be a candidate for any office at the next ensuing election but a notary public shall not be disqualified from acting as a judge or clerk.

"2. No person shall be appointed or serve as judge or clerk in any election or registration who has been convicted of an offense punishable by imprisonment by the state department of corrections, or who has been convicted and confined in a county jail, workhouse or house of corrections within five years prior to his appointment." (Emphasis added.)

Your question seems to presume that a situation might arise in which a political subdivision is located primarily within one or more precincts, but overlaps into a small portion of another precinct, and that the overlapping portion of the political subdivision would not contain a sufficient number of voters to staff a polling place. The law does not require the impossible. In cases where there are not sufficient voters in a precinct to staff a polling place, the number of election officials is limited by the available, qualified persons and an election conducted by less than the number of statutorily required officials is valid under such circumstances. If no one within that part of the political subdivision in a precinct can be found who will serve as an election official, election officials for such precinct may be appointed from elsewhere in the political subdivision.

". . . [T]he law governing the appointment of judges and clerks is clearly directory, and courts will not nullify the result of votes honestly cast and counted, although the statute has not been strictly complied with. . . ."

Honorable James C. Kirkpatrick

Breuninger v. Hill, 210 S.W. 67, 71 (Mo.Banc
1919).

CONCLUSION

Therefore, it is the opinion of this office that, with respect to cities and counties which are required to maintain a system of voter registration under Sections 114.011 - 114.146, RSMo Supp. 1973:

1. A city may designate election precincts pursuant to Section 114.116, RSMo Supp. 1973, without regard to the ward boundaries of such city, and may make the entire city one voting precinct; but a city located in more than one county must establish at least one election precinct in each such county.
2. A political subdivision encompassing more than one precinct, or parts of more than one precinct, must establish a polling place within each such precinct when conducting an election, except where the political subdivision is specifically entitled by law to consolidate precincts for that election and such consolidation will not interfere with the precinct system of voting in any other political subdivision which conducts an election on the same day.
3. In cases where there are not sufficient voters in a precinct to staff a polling place, an election conducted by less than the number of statutorily required officials is valid. If no one can be found in that part of a political subdivision within a precinct who will serve as an election official, election officials may be appointed for such precinct from elsewhere in the political subdivision.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mark D. Mittleman.

Very truly yours,



JOHN C. DANFORTH
Attorney General

ELECTIONS: In cities and counties governed
PRECINCTS: by Sections 114.011-114.146, RSMo
HOSPITAL DISTRICTS: Supp. 1973: 1. The boards of nurs-
NURSING HOME DISTRICTS: ing home districts and the boards
of hospital districts may not des-
ignate voting precincts. The precincts for elections of those po-
litical subdivisions are those established by the governing bodies
of cities or by county courts pursuant to Section 114.116, RSMo
Supp. 1973. The boards of nursing home districts and hospital dis-
tricts may not consolidate such precincts. 2. When a political sub-
division other than a county holds an election, absentee ballots
are to be furnished to voters by the political subdivision.

OPINION NO. 117

March 13, 1974



Honorable James C. Kirkpatrick
Secretary of State
Room 209, Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Kirkpatrick:

This official opinion is issued in response to your request for a ruling on the following questions relating to the effect of SSHCSHB No. 20, 77th General Assembly (Sections 114.011-114.146, RSMo Supp. 1973), on the election laws of Missouri.

We will confine our discussion to those counties and cities where elections are governed by Sections 114.011-114.146: that is, counties and cities which do not have boards of election commissioners.

Your first question is as follows:

"Can the boards of nursing home districts and the boards of hospital districts designate precincts (see Section 198.250 and Section 206.060, RSMo 1969) without consideration to the precincts established by the governing body of a city and county court? Can such boards consolidate precincts created under Sections 114.011-114.146?"

Section 198.250, RSMo 1969, provides as follows for nursing home district elections:

"Notice of the election shall be given by publication on three separate days in one or more

Honorable James C. Kirkpatrick

newspapers having general circulation within the territory, the first of which publications shall be not less than thirty days prior to the date of the election, and by posting notices in ten of the most public places in the territory, and in case no newspaper has a general circulation in the territory, the notices shall be so posted in fifteen of the most public places therein, not less than thirty days prior to the date of the election. Each notice shall state briefly the purpose of the election, setting forth the proposition to be voted upon, form of ballot to be used at the election, a description of the territory, set forth the election precincts, and designate the polling places therefor. The notice shall further state that any district upon its establishment shall have the powers, objects and purposes provided by sections 198.200 to 198.350, and shall have the power to levy a property tax not to exceed fifteen cents on the one hundred dollars valuation." (Emphasis added).

The wording of Section 206.060, RSMo 1969, pertaining to hospital district elections, is virtually identical to that of Section 198.250.

However, Section 114.116, RSMo Supp. 1973, provides as follows:

"1. Election districts or precincts for that part of the county outside the corporate limits of any city, town or village, which for municipal election purposes is subject to the provisions of sections 114.011 to 114.146 shall be set by the county court. The election precincts for that part of the county within any city, town or village, which for municipal election purposes is subject to the provisions of sections 114.011 to 114.146 shall be set by the governing body of the city, town or village or by the municipal election authority, whichever the case may be.

"2. No election precinct established in any city, town or village, which for municipal election purposes is subject to the provisions of sections 114.011 to 114.146, shall

Honorable James C. Kirkpatrick

encompass territory outside the corporate limits of the city, town or village, nor shall such precinct encompass territory in more than one county."

Your question asks, in effect, whether Section 114.116 has repealed the authority formerly granted to the boards of nursing home districts and hospital districts to "set . . . the election precincts" for elections in those political subdivisions. We hold that it has done so.

It is true that the implied repeal of a statute by a later-enacted statute, which does not explicitly repeal the earlier one, is not favored in the law. Nor is the repeal of a specific statute, such as Section 198.250 or Section 206.060, by a general one, such as Sections 114.011-114.146, favored, when it is possible to reconcile and harmonize the conflicting statutes by construction. The rule governing implied repeal has been held to require that ". . . the two statutes are so repugnant that both cannot stand, and therefore the Legislature necessarily intended repeal, even though they did not expressly so provide. . . ." Kansas City Terminal Railway Company v. Industrial Commission, 396 S.W.2d 678, 683 (Mo. 1965). But in this instance we believe that in fact such a stringent test can be met.

". . . the law favors constructions which harmonize with reason, and which tend to avoid unjust, absurd, unreasonable or confiscatory results, or oppression" State ex rel. Stern Brothers & Co. v. Stilley, 337 S.W.2d 934, 939 (Mo. 1960).

Section 114.116, of course, was enacted as part of a comprehensive election reform act, SSHCSHB No. 20, 77th General Assembly. The first section of that act, now Section 114.011, RSMo Supp. 1973, provides as follows:

"The provisions of sections 114.011 to 114.146 shall apply in all elections except those in cities and counties having a board of election commissioners. It is the intent of sections 114.011 to 114.146 that the election officials of each county, in connection with the registration of voters and in order to promote and encourage voter registrations, shall establish a sufficient number of registration places throughout the county and at such days and hours for the convenience of persons desiring to register, to the end that registration may be maintained at a high level."
(Emphasis added).

Honorable James C. Kirkpatrick

Furthermore, Section 114.016, RSMo Supp. 1973 (also a part of SSHCSHB No. 20), provides as follows:

"1. No person shall be permitted to vote in any election unless he is duly registered and unless his name thereby appears in both the county record and the precinct record for the county and precinct in which he resides.

"2. The registration of voters shall be held as provided in sections 114.016 to 114.146. After registering, a voter is not required to register again, except as provided in this act. The registration of voters may be changed, canceled or transferred only as provided in sections 114.016 to 114.146."

In our Opinion No. 116, 1974, issued to the Honorable James C. Kirkpatrick, copy of which is attached hereto, we pointed out that the comprehensive system of registration and voting established for "all elections" (except in certain cities and counties) by Sections 114.011-114.146 "is based upon registration by precincts." We specifically noted Section 114.091, which establishes the procedure for voting under the new registration law.

The legislature clearly intended this procedure for voting to apply in nursing home district and hospital district elections. Sections 114.011, 114.016. The power to designate precincts under Sections 114.011-114.146 is limited by Section 114.116 to county courts and the governing bodies of cities, towns and villages, or municipal election authorities.

Therefore, we conclude that, insofar as Sections 198.250 and 206.060 give the boards of nursing home districts and hospital districts the power to establish precincts for their elections, they are repugnant to Sections 114.011-114.146; and the legislature must necessarily have intended to repeal them in that respect by enacting the latter statutes. The precincts for voting in nursing home district elections and hospital district elections will be those established under Section 114.116, or such parts of those precincts as the nursing home districts or hospital districts may occupy.

In our Opinion No. 116, we pointed out that certain political subdivisions were entitled by law to consolidate precincts established under Section 114.116, in order to provide a single polling place to serve more than one precinct, unless such consolidation would interfere with the precinct system of voting in any other political subdivision conducting an election on the same day. However, we do not believe that nursing home districts and hospital

Honorable James C. Kirkpatrick

districts are among the political subdivisions entitled to do so. Their power to "set forth the election precincts, and designate the polling places therefor," as provided in Sections 198.250 and 206.060, cannot be construed to include the power to consolidate precincts, which other statutes (e.g., Sections 95.145 and 162.381, RSMo 1969) authorize in explicit terms.

" . . . 'Provisions not found plainly written or necessarily implied from what is written will not be imparted or interpolated therein in order that the existence of [a] right may be made to appear when otherwise, upon the face of [the statutes], it would not appear.' . . . 'We are guided by what the legislature says, and not by what we may think it meant to say.' . . . " Missouri Public Service Company v. Platte-Clay Electric Cooperative, Inc., 407 S.W.2d 883, 891 (Mo. 1966).

Your second question asks:

"When a political subdivision other than a county holds an election, what officials are responsible for furnishing absentee ballots?"

Your second question requires us to construe and harmonize several provisions of Chapter 112, RSMo 1969, relating to absentee voting, with provisions of SSHCSHB No. 20.

Section 112.020, RSMo 1969, provides as follows:

"Any person who qualifies to vote an absentee ballot, pursuant to the provisions of section 112.010, may apply in person or by mail for an official ballot for the election district or precinct in which he resides. The application shall be made to the election authority within thirty days prior to election day. The application made in person shall be made not later than four p.m. of the day before the election. The application made by mail shall be received not later than four p.m. on the fourth day before the election. If the voter recovers from his illness or physical disability and can go to the proper polling place, or if the voter, having expected to be absent, is in the county of his residence on election day, the absentee

Honorable James C. Kirkpatrick

ballot cast by the voter shall stand as his official vote unless he appears before the election authority prior to nine a.m. on the Friday before the election and destroys the ballot in the presence of a proper official."

The term "the election authority" is defined in Section 112.015, subsection 2, to mean ". . . the county clerk, board of election commissioners or other officer or governmental entity charged with the duty of conducting elections."

Section 112.030 provides as follows:

"1. Application for an absentee ballot may be made on a blank signed by the applicant, to be furnished by the election authority, or may be made in writing by first class mail addressed to the election authority and signed by the applicant. Immediately upon receipt of each application, within the time and in the manner provided, the election authority shall make a list of the names of the absentee voters whose applications for ballots have been received, and shall cause the list to be immediately posted in a conspicuous place accessible to the public at the entrance of the office of the election authority. The list shall show also the post office address, street address, election district or precinct number given by the applicant.

"2. The election authority shall not furnish a ballot to any person who is not lawfully entitled to vote. If the applicant for a ballot is entitled to receive the ballot, the election authority shall send an official ballot in a separate envelope addressed to each absentee voter by certified mail with return receipt or shall deliver in person an official ballot to any applicant applying in person at the office of the election authority.

"3. The official charged by law with printing and supplying ballots under the general election laws of this state shall, at least thirty days before any election at which absentee ballots may be cast, cause to be printed and supplied a sufficient number of ballots to

Honorable James C. Kirkpatrick

be designated as 'official absentee ballots' to be furnished absentee voters." (Emphasis added).

And Section 112.061, subsection 1, provides that:

"1. The election authority shall keep a list for the purpose of entering the name and address, and the election district or precinct of each voter submitting an absentee ballot. As each ballot is received this information shall be entered on the list and a consecutive number assigned to the absentee voter. This number shall be prominently placed upon the mailing envelope beneath the affidavit of each absentee ballot received. The list shall be available for public inspection at all reasonable times."

Section 112.063, subsection 1, provides that:

"1. After nine a.m. on the fourth day before the election, the election authority shall, where voter registration is required, show in the registration records that each voter who submitted an absentee ballot, and who did not destroy the ballot pursuant to the provisions of section 112.020, has voted at the election for which the absentee ballot was submitted and is thereby ineligible to vote at the polls at the election for which the absentee ballot was submitted."

The key term in all these provisions is "the election authority."

Section 114.121 states that:

"The conduct of any election, including the appointment of judges and clerks, canvassing of ballots, choice of polling places and all other acts pertaining to the election, shall be under the direction of the political subdivision conducting the election, except where otherwise provided by law."

We see no reason why the political subdivision conducting the election cannot perform all the functions which Chapter 112

Honorable James C. Kirkpatrick

requires of "the election authority." It is true that Section 114.051, subsection 2, provides:

"The county clerk, before the opening of the polls for any election, shall deliver to the judges of election, appointed under and by virtue of the general laws of election, proper registration records for their respective precinct and shall take a receipt from the judge to whom the records are delivered and keep the receipts on file until the records are returned."

But the political subdivision, which cannot accept any absentee ballots after four p.m. on the day before the election (under Section 112.050), will be able to make appropriate notations in the registration records in compliance with Section 112.063, subsection 1, before the county clerk delivers the registration records to the election judges.

CONCLUSION

Therefore, it is the opinion of this office that, in cities and counties governed by Sections 114.011-114.146, RSMo Supp. 1973:

1. The boards of nursing home districts and the boards of hospital districts may not designate voting precincts. The precincts for elections of those political subdivisions are those established by the governing bodies of cities or by county courts pursuant to Section 114.116, RSMo Supp. 1973. The boards of nursing home districts and hospital districts may not consolidate such precincts.

2. When a political subdivision other than a county holds an election, absentee ballots are to be furnished to voters by the political subdivision.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mark D. Mittleman.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 116
1974, Kirkpatrick



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

May 28, 1974

OPINION LETTER NO. 119

Honorable Vernon King
Representative, District 16
2007 East Ridge Drive
Excelsior Springs, Missouri 64024

Dear Representative King:

This letter is sent to you in response to your request for an official opinion on the question of whether the use of postcards by a township collector, to inform township residents of taxes due, is a valid exercise of that collector's duties and not in violation of the law or an invasion of privacy.

The procedures to be followed by township collectors of township organization counties are governed by the provisions of Section 139.350, RSMo 1969. Assuming, of course, that these procedures are otherwise complied with in the collection of the applicable taxes, we are not aware of any statutes which would prohibit a township collector from notifying residents of taxes due by means of a postcard sent through the mail. Nor do we believe that this would in any way constitute an invasion of the taxpayers' privacy, especially since the county assessment rolls and tax books are, of course, public records. See Chapter 610, RSMo Supp. 1973; Section 109.180, RSMo 1969.

Yours very truly,

JOHN C. DANFORTH
Attorney General

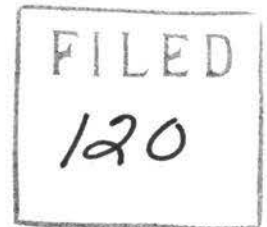
HOMESTEAD:
CIRCUIT BREAKER:
TAXATION (INCOME):

1. If one spouse who is eligible to receive a property tax credit under Sections 135.010 through 135.030, RSMo Supp. 1973, dies before the end of the calendar year for which the credit is to be claimed, the surviving spouse is entitled to credit only if such surviving spouse can personally fulfill the requirements for claiming a credit as an individual. Specifically, the surviving spouse must have attained the age of sixty-five on or before the last day of the calendar year for which the credit is claimed. 2. The personal representative of a deceased person who was eligible to claim the tax credit is entitled to receive the credit, if the deceased person survived to the end of the year for which the credit is claimed, unless the credit is properly claimed by the deceased person's surviving spouse.

OPINION NO. 120

February 14, 1974

Honorable Keith Barbero
Representative, District 54
Room 101D, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Barbero:

This official opinion is issued in response to your request for a ruling on the following questions regarding Sections 135.010 through 135.030, RSMo Supp. 1973 (House Bills No. 47, 149, 417, 425, and 471, 77th General Assembly):

" . . . should a husband or his wife die within the calendar year, could the survivor become a claimant and/or the estate of the deceased become a claimant? . . . "

The answers to these questions will depend largely upon the interpretation of Section 135.010(1), which states as follows:

"As used in sections 135.010 to 135.030 the following words and terms mean:

(1) 'Claimant', a person or persons claiming a credit under sections 135.010 to 135.030. If the persons are eligible to file a joint federal income tax return, then the credit may only be allowed if claimed on a combined Missouri income tax return or a combined claim return reporting their combined incomes and

Honorable Keith Barbero

property taxes. A claimant shall not be allowed a property tax credit unless the claimant or spouse attained the age of sixty-five on or before the last day of the calendar year and unless claimant and spouse were residents of Missouri for the entire year;"

Sections 135.010 through 135.030 were authorized by Section 6(a) of Article X of the Constitution of Missouri, which was adopted at the general election of November 7, 1972, and which provides as follows:

"The general assembly may provide that a portion of the valuation of real property actually occupied by the owner or owners thereof, who are over the age of sixty-five, as a homestead, be exempted from the payment of taxes thereon, in such amounts and upon such conditions as may be determined by law, or the general assembly may provide for certain tax credits or rebates in lieu of such an exemption, but any such law shall further provide for restitution to the respective political subdivisions of revenues lost by reason of the exemption, and any such law may also provide for comparable financial relief to persons of such ages who are not the owners of homesteads but who occupy rental property as their homes."

In our Opinion No. 240, issued August 24, 1973, to James R. Spradling, we stated that ". . . the bill [Sections 135.010 through 135.030] is a welfare measure which utilizes the Income Tax Unit of the Department of Revenue as the operational vehicle for the administration of grants to the elderly persons who come within its provisions." We also stated that ". . . it must be borne in mind that statutory provisions of a remedial nature are to be liberally interpreted. . . . The same is true of statutes enacted for a beneficent purpose. . . ." We attach a copy of Opinion No. 240.

Some confusion may have arisen because of the wording of the last sentence of Section 135.010(1):

". . . A claimant shall not be allowed a property tax credit unless the claimant or spouse attained the age of sixty-five on or before the last day of the calendar year and unless claimant and spouse were residents of Missouri for the entire year;" (emphasis added).

Honorable Keith Barbero

The first question you ask amounts, in substance, to whether the last clause of that sentence would bar a surviving spouse from claiming property tax relief because death prevented the deceased spouse from being a "resident" of Missouri for the entire year. However, we do not so construe this language.

Initially, we should point out that two distinct problems can arise under the above-quoted sentence. The first occurs where both the surviving and the deceased spouse attained the age of sixty-five on or before the last day of the calendar year. The second occurs where the surviving spouse has not yet attained the age of sixty-five by the last day of the calendar year, but the deceased spouse had done so before dying. This distinction must be kept in mind in light of the second sentence of Section 135.010(1):

" . . . if the persons are eligible to file a joint federal income tax return, then the credit may only be allowed if claimed on a combined Missouri income tax return or a combined claim return reporting their combined incomes and property taxes. . . ."

A spouse under the age of sixty-five years can only become a "claimant" by virtue of that sentence. In effect, such a spouse is compelled to be a claimant by the requirement that the credit may only be allowed if persons who are eligible to file a joint federal income tax return in fact claim the credit on a combined Missouri return. Such a spouse actually has no right to claim the tax credit, except through the other spouse who is over sixty-five. The last sentence of Section 135.010(1) is, therefore, worded so that it does not bar jointly claiming spouses from obtaining the credit merely because one of them has not yet attained the age of sixty-five; that is the purpose of its disjunctive language ". . . unless the claimant or spouse attained the age of sixty-five on or before the last day of the calendar year. . . ." (emphasis added).

But the spouse under sixty-five has no personal right to the tax credit. Thus, if a spouse over sixty-five dies within the calendar year, the survivor could only qualify for the tax credit if independently entitled to receive it. A surviving spouse over sixty-five would be eligible to receive the tax credit independently (assuming the other requirements of the law were fulfilled), but one under sixty-five would not.

If the surviving spouse is over sixty-five, however, would the tax credit nonetheless be barred because both the claimant and the (deceased) spouse were not "residents" of Missouri for the entire year? In light of the manifest purpose of the legislation,

Honorable Keith Barbero

we are unable to conclude that a qualified claimant should be deprived of the credit merely because the claimant's spouse did not survive throughout the calendar year. It is more reasonable to conclude that the intent of the words ". . . unless claimant and spouse were residents of Missouri for the entire year;" is to bar claims by persons (and the spouses of persons) who were residents of states other than Missouri during the year. Unless one spouse (either the survivor or the deceased) was a resident of a state other than Missouri during the calendar year, the credit should be allowed.

The remaining question to be decided is whether the estate of a decedent may become a claimant. The first sentence of Section 135.010(1) defines "claimant" as a person or persons claiming a credit. It is true that the estate of a decedent is not a person. However, the legislative history of Sections 135.010 through 135.030 is relevant to this question. House Bills No. 47, 417, and 425 and Senate Bill No. 15, 77th General Assembly (1973), in their original form, all contained provisions that the right to a tax credit should be personal to the claimant and not survive the claimant's death. (However, they also provided that if the claimant died after filing a valid claim, the claim could be paid to the executor or administrator of the claimant's estate.) But these provisions were deleted from the bill in its final form.

From this history and from the general principles of construction cited above, we conclude that the executor or administrator of the deceased person's estate or other personal representative of a person who would have been eligible to file a claim for the tax credit should be permitted to claim such a credit, even if that person had not yet filed a claim at the time of his death. (This conclusion does not apply to the situation where the deceased person's surviving spouse is eligible to claim the credit, because the surviving spouse will still file a combined return under Section 135.010(1) to obtain the credit.) However, will a credit be available to the personal representative if the deceased person did not survive to the end of the calendar year for which the credit is claimed?

Section 135.010(5) sets forth a means for determining the amount of property tax for which a credit is allowed when a homestead is not occupied for a full calendar year:

"(5) 'Property taxes accrued', property taxes paid, exclusive of special assessments, penalties, interest, and charges for service levied on a claimant's homestead in 1973 or any calendar year thereafter. Property taxes shall

Honorable Keith Barbero

qualify for the credit only if actually paid prior to the date a return is filed. The director of revenue shall require a tax receipt or other proof of property tax payment. If a homestead is owned only partially by a claimant and spouse, then 'property taxes accrued' is that part of property taxes levied on the homestead which reflects the ownership percentage of the claimant and spouse. For purposes of this paragraph property taxes are 'levied' when the tax roll is delivered to the collector of revenue for collection. If a claimant and spouse own a homestead part of the preceding calendar year and rent it or a different homestead for part of the same year, 'property taxes accrued' means only taxes levied on the homestead both owned and occupied by the claimant, multiplied by the percentage of twelve months that such property was owned and occupied as their homestead during the year. When a claimant and spouse owns and occupies two or more different homesteads in the same calendar year, property taxes accrued shall be the sum of the taxes allocable to those several properties occupied by them as a homestead for the year. If a homestead is an integral part of a larger unit such as a farm, or a multipurpose or multidwelling building, property taxes accrued, shall be that percentage of the total property taxes accrued as the value of the homestead is of the total value. For purposes of this paragraph 'unit' refers to the parcel of property covered by a single tax statement of which the homestead is a part;" (emphasis added).

But this section only specifies that such calculations are to be made if the claimant occupies two different homesteads during a year, or occupies a homestead part of the year and rental property for a part of the year. Even under the liberal principles of construction appropriate to a statute of this nature, we do not believe that Section 135.010(5) can be applied to calculate a proportional tax credit for the estate of a person who was (otherwise) qualified to receive a tax credit, but who died before the end of the calendar year.

Indeed, we are unable to find authorization anywhere in Sections 135.010 through 135.030 for a tax credit to persons who do

Honorable Keith Barbero

not survive through an entire year. Under Section 135.030, eligibility for the tax credit is conditioned upon the claimant's income not exceeding seven thousand five hundred dollars for the year of the claim. But nothing in the statutory scheme contemplates a determination of eligibility based on only part of a year.

Without a clearer expression of legislative intent, we cannot presume that a tax credit may be granted to persons whose income for less than a full year did not exceed seven thousand five hundred dollars. It is possible to construe the language of a statute liberally to give full effect to the legislature's intent, but not to read additional provisions into a statute whose history and language are inadequate to support such a construction.

" . . . 'Provisions not found plainly written or necessarily implied from what is written "will not be imparted or interpolated therein in order that the existence of [a] right may be made to appear when otherwise, upon the face of [the statutes], it would not appear."
 . . . 'We are guided by what the legislature says, and not by what we may think it meant to say.' . . . " Missouri Public Service Company v. Platte-Clay Electric Cooperative, Inc.,
407 S.W.2d 883, 891 (Mo. 1966).

CONCLUSION

Therefore, it is the opinion of this office that:

1. If one spouse who is eligible to receive a property tax credit under Sections 135.010 through 135.030, RSMo Supp. 1973, dies before the end of the calendar year for which the credit is to be claimed, the surviving spouse is entitled to credit only if such surviving spouse can personally fulfill the requirements for claiming a credit as an individual. Specifically, the surviving spouse must have attained the age of sixty-five on or before the last day of the calendar year for which the credit is claimed.

2. The personal representative of a deceased person who was eligible to claim the tax credit is entitled to receive the credit, if the deceased person survived to the end of the year for which the credit is claimed, unless the credit is properly claimed by the deceased person's surviving spouse.

Honorable Keith Barbero

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mark D. Mittleman.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 240
8-24-73, Spradling

February 13, 1974

OPINION LETTER NO. 122
Answer by Letter - Bartlett

Dr. Arthur L. Mallory
Commissioner of Education
State Department of Education
Jefferson State Office Building
Jefferson City, Missouri 65101



Dear Dr. Mallory:

This is in answer to your request for our review and certification of the State Board of Education's Application for Grant for Comprehensive Educational Planning and Evaluation under the Elementary and Secondary Education Act of 1965, Title V, Part C, P.L. 89-10, as amended, for the fiscal year 1974.

It is the opinion of this office that the Missouri State Board of Education is the agency in this state primarily responsible for state supervision of public elementary and secondary schools, and is the "State educational agency" as defined in Section 801(k) of Title VIII of P.L. 89-10, as amended; and that the State Board of Education has the authority under state law to submit an application for a grant pursuant to Title V, Part C, P.L. 89-10. See Sections 161.092 and 178.430, RSMo 1969.

In conjunction with this letter opinion which constitutes our official certification of the application, the required certification form has been executed.

Very truly yours,

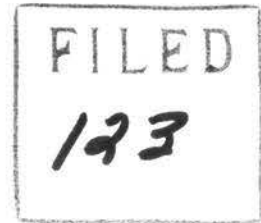
JOHN C. DANFORTH
Attorney General

CONSTITUTIONAL LAW: Under the provisions of Section 20(a)
GENERAL ASSEMBLY: of Article III of the Missouri Consti-
tution, the first extraordinary session
of the 77th General Assembly will be automatically adjourned
sine die at midnight, Friday, February 1, 1974, unless it has
adjourned sine die prior thereto.

OPINION NO. 123

January 30, 1974

Honorable Kenneth J. Rothman
State Representative, 77th District
Room 309, State Capitol Building
Jefferson City, Missouri 65101



Dear Representative Rothman:

This is in answer to your recent request for an official
opinion of this office reading as follows:

"Section 20A of Article 3 of the Constitu-
tion of Missouri states that the General
Assembly shall automatically stand adjourned
sine die at midnight on the 60th calendar
day after the date of its convening in spe-
cial session, unless it has adjourned sine
die prior thereto.

"In determining the proper date for the pre-
sent special session to adjourn, does this
mean that the First Extraordinary Session
which convened on December 3, 1973, must
adjourn sine die at midnight on January 31
or February 1, 1974? It is necessary that
we determine this as soon as possible so that
we can plan on the necessary procedure as
concerns passage of various bills. In par-
ticular, we want to be assured that if a
bill were passed on Feb. 1, 1974 that it
would not be unconstitutional since it would
be passed after the close of the special ses-
sion, provided, the special session closes
on January 31, 1974."

The answer to your question is contained in the official
opinion rendered by this office under date of April 1, 1958, to
Governor Warren E. Hearnes, a copy of which opinion we enclose.

Honorable Kenneth J. Rothman

Such opinion holds that in determining the date upon which the General Assembly automatically stands adjourned after being convened in extraordinary session the first day of the session is excluded and the sixtieth legislative day thereafter determines the date of adjournment. Therefore, since the first extraordinary session of the 77th General Assembly convened December 3, 1973, such date is excluded. The sixtieth day thereafter is Friday, February 1, 1974.

CONCLUSION

It is the opinion of this office that under the provisions of Section 20(a) of Article III of the Missouri Constitution, the first extraordinary session of the 77th General Assembly will be automatically adjourned sine die at midnight, Friday, February 1, 1974, unless it has adjourned sine die prior thereto.

The foregoing opinion, which I hereby approve, was prepared by my assistant, C. B. Burns, Jr.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 38
4-1-58, Hearnese

PARKING FACILITY: The Joint Resolution (House Committee
JOINT RESOLUTION: Substitute for Senate Concurrent Resolu-
GENERAL ASSEMBLY: tion No. 2, House Journal First Extra
Session, Sixteenth Day) of the Missouri
General Assembly purporting to regulate parking facilities on the
Capitol grounds and in the Capitol garage is invalid to the extent
that it conflicts with the statutory authority of the Office of
Administration to regulate parking upon the Capitol grounds but
is valid to the extent that it regulates parking in the facility
whose construction was authorized by House Bill No. 75 (Laws 1961,
p. 568). Said resolution, not having the force and effect of law
and being administrative in nature is not required to be approved
by the Governor and is not precluded from adoption in a special
session.

OPINION NO. 124

February 8, 1974

Honorable James R. Strong
Representative, District 119
Room 101E, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Strong:

This opinion is in response to your question asking:

- "I. Is a resolution by the General Assembly sufficient authority for the Legislature to control and operate a parking facility on State Property, or take over any other State property for their own use.
- "II. Does the language of Sec.1, HB75, Laws of Missouri, 1961, page 568, approved 7-5-61, which purports to give the General Assembly the authority to 'make rules and regulations at all parking spaces' violate the provisions of Article II, Sec.1, Article III, or any other provision of the Missouri Constitution.
- "III. Does the action, in adopting the concurrent resolution in question (HCS for SCR2) in a special session, when the subject matter of the Resolution was not included in the Governor's call or subsequent message, violate the provisions of Art, III, Sec.39 (7), of the Missouri Constitution.

Honorable James R. Strong

"IV. Does the subsequent enactment of Sec. 8.172, Missouri Laws of 1965, page 126, constitute a later specific enactment which contravenes the provision of HB75, Laws of Missouri, 1961, approved 7-5-61."

In view of your request for a prompt reply, we have expedited our review of these questions.

The resolution to which you refer (House Committee Substitute for Senate Concurrent Resolution No. 2, House Journal First Extraordinary Session, Sixteenth Day, January 17, 1974) provides in full:

"WHEREAS, Section 8.172 RSMo 1969 requires the director of the Division of Planning and Construction to make rules and regulations for the regulation of parking upon the capitol grounds and upon the grounds of other state buildings located within the capital city; and

"WHEREAS, Section 8.174 RSMo 1969 provides that said director shall, during sessions of the General Assembly, provide parking space plainly marked and available at the hours determined by the director for the use of each member of the General Assembly during each regular or special session; and

"WHEREAS, the General Assembly of Missouri having passed into law July 5, 1961, an Act to provide for the construction of a parking facility on state owned land in Jefferson City; and

"WHEREAS, that act titled House Bill No. 75 and found on pages 568-571 of the Laws of Missouri, 1961, sets out in Section 1 certain provisions after said parking facility was constructed; and

"WHEREAS, said provisions of Section 1 direct that the General Assembly shall by resolution make rules and regulations for parking at all parking spaces in such parking facility solely and exclusively for state purposes; and

Honorable James R. Strong

"WHEREAS, said parking facility having now been constructed on land just east and adjacent to the Capitol Building and commonly referred to as the Capitol Parking Garage; and

"WHEREAS, some confusion has arisen concerning the matter of parking spaces for members of the General Assembly and staff employees in and around the Capitol Building;

"NOW, THEREFORE, BE IT RESOLVED by the Senate, the House of Representatives concurring therein, that the General Assembly establish the following:

Rule 1. During each regular or special session of the General Assembly each member of the General Assembly shall be assigned, by the Accounts Committee of each house, one parking space either on the Capitol grounds, or in the Capitol Parking Garage, as requested by each member.

Rule 2. There shall be reserved in the Capitol Parking Garage one hundred parking spaces by the General Assembly to be divided equally between the Senate and the House of Representatives for the use of the full-time staff and other employees of each house as designated and assigned by the accounts committees of each house."

House Bill No. 75, 71st General Assembly (Laws of 1961), which authorized the construction of the underground parking facility, as first introduced, placed the control, jurisdiction, and maintenance of the facility in the then "board of public buildings." The "truly agreed to and finally passed" bill, however, provided that the General Assembly "shall by resolution make rules and regulations for parking at all parking spaces in such parking facility solely and exclusively for state purposes." Section 1 of the bill to which we particularly refer provides as follows:

"The board of public buildings is hereby authorized, empowered and directed to erect and construct, or to cause to be erected and constructed, in the manner hereinafter provided a parking facility on state owned lands in the City of Jefferson, Cole County, Missouri.

Honorable James R. Strong

After the building shall be constructed, the General Assembly shall by Resolution make rules and regulations for parking at all parking spaces in such parking facility solely and exclusively for state purposes."

Although the above section was never printed in the Revised Statutes of Missouri, it was never expressly repealed as far as we are able to ascertain. The failure to print the bill in the Revised Statutes does not affect its validity. Protection Mutual Insurance Co. v. Kansas City, Missouri, No. 57445 (Mo. January 14, 1974).

Section 8.172, RSMo, to which you refer provides as follows:

"The director of the division of planning and construction shall make rules and regulations for the regulation of traffic and parking at all parking spaces upon the capitol grounds and upon the grounds of other state buildings located within the capital city. The regulations shall be enforced by guards."

Section 8.172 was originally enacted in the Laws of 1955, amended in 1957 to substitute "public buildings" in lieu of "division of public buildings" in the first sentence and, in 1965 similarly amended to substitute "division of planning and construction" in lieu of "public buildings." Subsection 3 of Section 26.300 (Laws of 1971, effective January 15, 1973) provides that the Commissioner of Administration shall head the Division of Planning and Construction.

Section 8.174, RSMo, to which the resolution refers, as last amended by the Laws of 1957, provides:

"During sessions of the general assembly the director shall provide parking space for each member and shall plainly mark the same so that the space is available at the hours determined by the director for the use of the members during each regular or special session."

Clearly House Bill No. 75 (1961) is a specific enactment directed to the particular facility whereas Sections 8.172 and 8.174 are general laws. General and special statutes should be read together and harmonized, if possible, but to the extent of a repugnancy, the special statute prevails. Section 1.020, V.A.M.S., "Construction of Statutes," note 95. The reenactment of Section 8.172

Honorable James R. Strong

did not have the effect of making it a later statute because the provisions of an amended statute, so far as they are the same as those of a prior law, are construed as a continuation of such law and not as a new enactment. Section 1.120, RSMo.

Therefore, to the extent that there may be any conflict between House Bill No. 75 and Section 8.172, the principles of statutory construction indicate that House Bill No. 75 controls.

House Bill No. 75, however, refers only to the facility designated in the resolution as that "commonly referred to as the Capitol Parking Garage." Any resolution adopted pursuant to that bill would be limited in its scope to the parking garage. Yet, it is clear that the legislature has attempted to regulate the use of parking facilities on the Capitol grounds under Rule 1 of the resolution. Such an extension of authority is not authorized by House Bill No. 75 and is clearly in conflict with Sections 8.172 and 8.174, RSMo.

We conclude that House Bill No. 75 is limited to the regulation of the parking garage and does not authorize the legislature to regulate by resolution or rule any other parking areas on the Capitol grounds. HCS for SCR No. 2 being only a joint resolution cannot have the effect of amending or repealing Sections 8.172 and 8.174 or authorize action contrary to such sections.

It is clear that "no resolution shall have the effect to repeal, extend or amend any law" even though presented to the Governor as a joint resolution. Section 8, Article IV, Missouri Constitution.

Our further consideration of the resolution is based on its effect insofar as it purports to regulate parking in the parking facility constructed pursuant to House Bill No. 75.

With respect to the question of whether the resolution in question may be valid without the approval of the Governor, we find no legal precedent to answer this question. Section 31 of Article III of the Missouri Constitution (cf. Section 8, Article IV) requires the consideration of the Governor of "all bills and joint resolutions passed by both houses" and the Governor's approval or rejection. However, the Missouri Supreme Court has held that a resolution creating an investigating committee to act between sessions of the General Assembly is valid without the approval of the Governor. State ex rel. Jones v. Atterbury, 300 S.W.2d 806 (Mo. Banc 1957). In so holding, the court declared that it could not interfere with the action of the legislative branch unless action taken is clearly contrary to some constitutional mandate and that the Governor's veto power is in derogation

Honorable James R. Strong

of the general plan of state government and must be strictly construed. The substance of such holding limited the resolutions which must be submitted to the Governor to those having the force of law and excepted the one questioned in that case on the basis that it "is administrative or procedural in character and that it does not have the force and effect of law." With this precedent before us, we can only conclude that it is likely that the Supreme Court would not declare the joint resolution invalid because it was not submitted to the Governor.

For the reasons stated above, we are also of the view that it is unlikely that the Court would hold such a concurrent resolution invalid because it was adopted in a special session.

In answer to your question respecting whether or not the resolution is in violation of the separation of powers provision, Section 1 of Article II of the Missouri Constitution, we must admit that the question is perplexing. Clearly, there is no precedent in this state for the usurpation of an executive function by the legislature. We have held that the legislature has a certain amount of control over its chambers. Opinion No. 228, June 12, 1969, Marshall, copy enclosed. Yet, the question still exists as to how far the legislature may extend its control over state properties in the guise of controlling and protecting the legislative prerogative and the legislative function. Such action will not be interfered with by a court unless it is clearly contrary to a constitutional mandate. State ex rel. Jones v. Atterbury, supra. The law and the courts clearly give the presumption of validity to acts of the legislature and declare such acts void only where there is a clear conflict between such acts and the Constitution. In the Matter of Burris, 66 Mo. 442 (1877) and Borden Company v. Thomason, 353 S.W.2d 735 (Mo. Banc 1962). We find no clear violation of the Constitution.

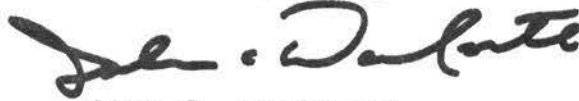
CONCLUSION

It is the opinion of this office that the Joint Resolution (House Committee Substitute for Senate Concurrent Resolution No. 2, House Journal First Extra Session, Sixteenth Day) of the Missouri General Assembly purporting to regulate parking facilities on the Capitol grounds and in the Capitol garage is invalid to the extent that it conflicts with the statutory authority of the Office of Administration to regulate parking upon the Capitol grounds but is valid to the extent that it regulates parking in the facility whose construction was authorized by House Bill No. 75 (Laws 1961, p. 568). Said resolution, not having the force and effect of law and being administrative in nature is not required to be approved by the Governor and is not precluded from adoption in a special session.

Honorable James R. Strong

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent.

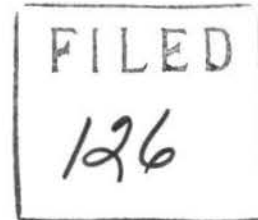
JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 228
6-12-69, Marshall

March 1, 1974

OPINION LETTER NO. 126
Answer by letter-Klaffenbach

Honorable Don Manford
State Senator, District 8
Room 425, Capitol Building
Jefferson City, Missouri 65101



Dear Senator Manford:

This letter is in response to your question asking:

"Do citizens (by virtue of the recent 'sunshine law') have the right to see and observe the actual ballots or in case of machine voting apparatus the vote count at the polls in both bond elections and/or election of public officials?"

You also state that:

"Bond issue--city of KC--residents and citizens ask election judges for permission to see actual vote recorded from voting machine--election judges denied them their request saying they were not authorized to do so under election laws--are such election official authorized or required to do so under new 'sunshine law'?"

The voting laws of this state set out precisely the procedures to be followed in the inspection and canvassing of the votes. The procedure respecting the canvass of results of elections by the use of voting machines is found in Sections 121.210, RSMo et seq.

Honorable Don Manford

The Sunshine Bill, to which you refer, now numbered Sections 610.010, RSMo Supp. 1973 et seq., excludes from its provisions records which are closed under other provisions of law.

We have compared the provisions of the election laws with the provisions of the Sunshine Bill, and it is our view that the persons who are not expressly authorized to view the actual vote recorded on the voting machines by the voting machine and election laws are not authorized to view such returns by the provisions of the Sunshine Bill.

Yours very truly,

JOHN C. DANFORTH
Attorney General



OFFICES OF THE

JOHN C. DANFORTH
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

March 18, 1974

OPINION LETTER NO. 127

Honorable Arthur T. Stephenson
Prosecuting Attorney
Pemiscot County Courthouse
Caruthersville, Missouri 63830

Dear Mr. Stephenson:

This is in response to your request for an opinion from this office in regard to the compensation the county treasurer is entitled to receive under Section 246.050, RSMo, for receiving, preserving, and paying out funds of drainage districts organized by the county court. You state that the incumbent county treasurer has been the duly elected county treasurer for the past 10 years and as county treasurer, has handled funds of county drainage districts pursuant to Chapter 246, RSMo. You further state that he has never been compensated for this service nor has he ever received any fee pursuant to Section 246.050, RSMo 1969. You state that it is your opinion the county treasurer is entitled to be compensated for his duties rendered to the drainage districts pursuant to Section 246.050, RSMo, for the past 5 years to be paid from the present funds of the various drainage districts.

Section 246.050, RSMo, provides:

"County treasurers for receiving, receipting for, preserving and paying out funds of drainage . . . districts, shall receive one percent of sums paid out."

Section 516.120, RSMo, provides for the court actions which must be commenced within 5 years, including subdivision (2), "An action upon a liability created by a statute other than a penalty or forfeiture;"

Honorable Arthur T. Stephenson

It is our opinion that a claim by the county treasurer for recovery of compensation provided for under Section 246.050, RSMo, would be an action upon a liability created by statute under Section 516.120(2) and recovery limited to compensation due within the last 5 years. Kay v. Moniteau County, 134 S.W.2d 81 (Mo. 1939).

Yours very truly,

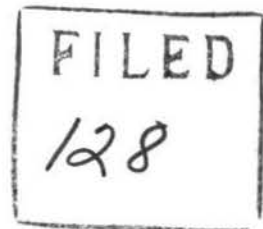
A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

May 24, 1974

OPINION LETTER NO. 128
Answer by letter--Klaffenbach

Mr. W. Clifton Banta, Jr.
Prosecuting Attorney
Mississippi County
Post Office Box 469
Charleston, Missouri 63834



Dear Mr. Banta:

This letter is in response to your question asking:

"Is the County Assessor of a Third Class County required in making up a tax book to cross index the real and personal tax books by indicating on the personal tax list the various pieces of real property, if any, owned by the taxpayers?"

"If the Assessor is not required by law to cross index the tax books, can the County Court of a Third Class County pay the Assessor for making up such an index if it is deemed necessary by the County Collector for the efficient administration of the tax collection system?"

You also state that:

"For several years in Mississippi County the County Assessor has listed the numbers of the various pieces of real property owned by each individual in the County next to that person's name in the personal tax books. This cross indexing system allows the Collector to send out personal and real property tax statements in one envelope. The Collector feels this is necessary for the efficient administration of

Mr. W. Clifton Banta, Jr.

his office. It is, however, much easier for the Assessor to do this as the tax books are made up than for the Collector to do it after the books are made up. The Assessor has this year refused to make up this index unless he is compensated for it as he does not feel he is required to do this by law."

We find no requirement that an assessor of such a county make such an index.

Further, we find no authority for the county to make payments to the assessor for making such an index. In this respect we attach our Opinion No. 83, November 14, 1933, to Settle and Opinion No. 20, March 12, 1934, to Dampf, both of which are self-explanatory.

Yours very truly,

JOHN C. DANFORTH
Attorney General

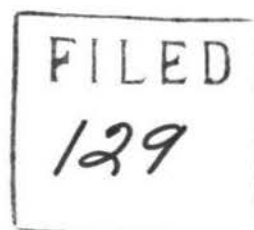
Enclosures: Op. No. 83
11-14-33, Settle

Op. No. 20
3-12-34, Dampf

April 4, 1974

OPINION LETTER NO. 129
Answer by letter-Boicourt

Honorable Harry Rupert Stafford, Jr.
Prosecuting Attorney
Douglas County
Box 4
Ava, Missouri 65608



Dear Mr. Stafford:

You have requested an opinion by the Office of the Attorney General for the state of Missouri pertaining to the following legal matters:

"1. Is revenue-sharing money 'public money' within the meaning of Section 25, Article VI, Missouri Constitution.

"2. Is not-for-profit corporation of senior citizens a private association or corporation within the meaning of Section 25, Article VI, Missouri Constitution.

"3. Does Section 38(a), Article III, Missouri Constitution allow revenue-sharing money to be distributed by the county court to a not-for-profit corporation of senior citizens."

You have made clear that your opinion request was submitted in your official capacity as prosecuting attorney of Douglas County, Missouri, to assist you in advising the county court of Douglas County, Missouri, whether they have legal authority to pay a share of the rental for the headquarters of the Douglas County Senior Citizens Association, Inc., a nonprofit corporation, leasing a building in Ava, Missouri.

Honorable Harry Rupert Stafford, Jr.

We first turn to the second question posed by your request. We have concluded that Article VI, Section 25, Constitution of Missouri (1945) prohibits a county from granting "public money or property," in the form of partial rent payments, to a not-for-profit corporation of senior citizens which clearly falls within the category of "any private individual, association or corporation." None of the exceptions to the general prohibition against the granting of public moneys to private institutions would apply to the not-for-profit corporation postulated by your opinion request. The constitutional provision in question makes absolutely no distinction between profit making business enterprises and nonprofit private corporations or associations formed for benevolent purposes.

Although not discussed in your opinion request, Article VI, Section 23, Constitution of Missouri (1945) also specifically prohibits the use of public funds to aid private corporations. We quote:

"No county, city or other political corporation or subdivision of the state shall own or subscribe for stock in any corporation or association, or lend its credit or grant public money or thing of value to or in aid of any corporation, association or individual, except as provided in this Constitution."
(Emphasis added).

Sections 23 and 25 of Article VI of the 1945 Missouri Constitution prohibit the granting of public moneys by the county court of Douglas County to the private not-for-profit corporation referred to in your request. See Ruggeri v. City of St. Louis, 429 S.W.2d 765, 769 (Mo. 1968); Attorney General's Opinion No. 75, Riley, February 29, 1952 (copy enclosed); and Attorney General's Opinion No. 69, Marshall, February 11, 1974 (copy enclosed).

Inquiries one and three submitted in your opinion request ask, in effect, whether the constitutional prohibition against municipalities granting money to private corporations applies to a grant of money accruing to a municipality via the federal revenue sharing program. We must answer that question in the affirmative. Section 123(a)(4) of Public Law 92-512, the State and Local Fiscal Assistance Act of 1972, requires a local unit of government, as a condition to the receipt of revenue sharing funds, to assure the United States Secretary of the Treasury that "it will provide for the expenditure of amounts received under subtitle A only in

Honorable Harry Rupert Stafford, Jr.

accordance with the laws and procedures applicable to the expenditure of its own revenues;". As stated hereinabove, the Constitution of this state prohibits a municipality from spending its own public revenues via grant to a private corporation.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 75
2-29-52, Riley

Op. No. 69
2-11-74, Marshall

CITY OFFICERS: A member of the board of trustees of
CITY HOSPITALS: a city hospital of a third class city
CITIES, TOWNS & VILLAGES: established pursuant to the provisions
of Sections 96.150, RSMo et seq., may
be removed under the procedures provided by Section 77.340, RSMo.
Such trustees being city officers within the meaning of Section 77.
400, RSMo, are within the conflict of interest provisions of Sec-
tion 77.470, RSMo.

OPINION NO. 136

March 6, 1974

Honorable E. Thomas Coleman
Representative, District 21
Room 100B, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Coleman:

This opinion is in response to your question asking:

"1. May members of the Board of Trustees of a city hospital established pursuant to the provisions of Sections 96.150 to 96.220 RSMo be removed under the provisions of Section 77.340 RSMo?

"2. If it is your opinion that such Hospital Board members cannot be removed as stated in question No. 1, could they be removed from office under the provisions of Sections 106.220 to 106.300 RSMo? If your opinion is in the affirmative, what grounds could be the basis for their removal under Sections 106.220 to 106.300 RSMo?"

Section 77.340, RSMo, with respect to the removal of city officers of third class cities provides:

"The mayor may, with the consent of a majority of all the members elected to the city council, remove from office, for cause shown, any elective officer of the city, such officer being first given opportunity, together with his witnesses, to be heard before the council, sitting as a court of impeachment. Any elective officer may, in like manner, for cause shown, be removed from office by a two-thirds

Honorable E. Thomas Coleman

vote of all the members elected to the city council, independently of the mayor's approval or recommendation. The mayor may, with the consent of a majority of all the members elected to the council, remove from office any appointive officer of the city at will; and any such appointive officer may be so removed by a two-thirds vote of all the members elected to the council, independently of the mayor's approval or recommendation. The council may pass ordinances regulating the manner of impeachment and removals."

Section 77.400, RSMo, provides:

"The term 'officer,' whenever used in this chapter, shall include any person holding any situation under the city government or any of its departments, with an annual salary, or for a definite term of office."

Trustees of such a city hospital of a third class city are appointed under the provisions of Section 96.160, RSMo, by the mayor of such city with the approval of the council, chosen from the citizens of such city and with reference to their fitness. Under such section the trustees serve without compensation. Under Section 96.170, RSMo, the trustees serve for a specific term.

The sections respecting such trustees contain no express provisions for their removal. However, we believe that such trustees are within the term "officer" as construed by Section 77.400 in that they are persons "... holding any situation under the city government ... for a definite term of office." Within the context of Sections 96.150, RSMo et seq., respecting such hospital trustees in third class cities, it is difficult to avoid the conclusion that the trustees hold a situation within the city government even though such trustees are autonomous to some extent in the operation of the hospital.

In view of this conclusion, we find it necessary to withdraw our Opinion No. 244 dated June 12, 1969, to Broomfield in which, referring to the same hospital board of trustees, we held that such a trustee was not a city officer under Section 77.470, the conflict of interest section relating to officers of third class cities, and was not disqualified from doing business with the city in areas totally unrelated to the operation of the hospital. We are thus of the view that Opinion No. 244, 1969, was incorrect and that a member of the board of trustees of such a hospital is

Honorable E. Thomas Coleman

such a city officer within the purview of Section 77.400 and within the prohibition of Section 77.470, RSMo, respecting conflict of interests. We do not believe, however, that prosecution of any person relying upon said opinion would be reasonable. Whatever inequities may exist in the application of Section 77.470 to such trustees is a matter for the concern of the General Assembly.

CONCLUSION

It is the opinion of this office that a member of the board of trustees of a city hospital of a third class city established pursuant to the provisions of Sections 96.150, RSMo et seq., may be removed under the procedures provided by Section 77.340, RSMo. Such trustees being city officers within the meaning of Section 77.400, RSMo, are within the conflict of interest provisions of Section 77.470, RSMo.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

May 7, 1974

OPINION LETTER NO. 137

Honorable Ronald McKenzie
Prosecuting Attorney
Marion County
Tower Plaza Office Building
Clinic Road
Hannibal, Missouri 63401

Dear Mr. McKenzie:

This letter is in response to your request for an opinion from this office as follows:

"Is a third class county responsible for the upkeep and maintenance of an indigent ward of the public administrator of that county.

"Mary Jane McLerren is a ward of the Probate Court of Marion County, Missouri. The Guardian is John Lyng, the Public Administrator of Marion County. The appointment of the guardianship was made after an incompetency hearing early in 1973. At the time of the incompetency hearing, Mrs. McLerren was living at a domiciliary home in Hannibal, Missouri. Since that time due to the decline in her health, Mrs. McLerren was moved to a nursing home in Hannibal, Missouri. The move which was made on Doctor's orders and because Mrs. McLerren could no longer stay at the domiciliary home due to its license requirements caused an increase in the monthly expenditure for the support of Mrs. McLerren of \$75.00 from \$225.00 a month to \$300.00 per month. Mrs. McLerren's income is \$283.50 per month. This income is insufficient to cover her monthly nursing

Honorable Ronald R. McKenzie

home bill, along with probate costs and guardian's fee.

"On the 27th day of August, 1973, John Lyng, Marion County Public Administrator filed a petition with the Marion County Court under Section 475.370 RSMo 1969, which set out that he was appointed the guardian for Mary Jane McLerren on the 28th day of March, 1973, and that since that time, he had acted as guardian, had completed an inventory and appraisal of all assets in the estate, had collected all income on behalf of the incompetent and had made all necessary and reasonable disbursements for her maintenance. That as of the 27th day of August, 1973, the incompetent, Mary Jane McLerren had an estate insufficient to pay her debts and maintain her, and that true account of the guardianship including all disbursements and all receipts and the inventory of the estate was attached to accompany the petition. The petition prayed that the Court make allowance for Mary Jane McLerren from the County Treasury sufficient to maintain her. According to section 475.370 RSMo. 1969.

"The petition of the Public Administrator was turned down by the County Court."

With your opinion request you submitted a statement concerning your views of the law regarding this matter. You state it is your view that Marion County is liable to pay for the maintenance and support of the ward, Mary Jane McLerren, that it is the obligation of the county court to support the poor indigent persons within the county under Section 205.580, and that, in your opinion, Mary Jane McLerren qualifies as a poor person under the statute and entitled to support. You state that it is your view under subsection 3 of Section 475.370, RSMo, the county court when presented with a petition as provided in this section has two alternatives:

". . . 1) to grant the prayer of the petition and make an order for payment for support and maintenance of the indigent ward out of the county treasury, or (2) to set out its reasons to the guardian why it is not satisfied that the estate and effects are insufficient for the purposes of the statute. . . ."

Honorable Ronald R. McKenzie

It is your opinion that the county court could take issue with whether or not the ward is a resident of the county, whether or not the ward is actually without an estate and without funds, or whether or not the guardian has made a proper account of the guardianship and performed his duty properly. It is also your opinion that if the court has no objection or reservation concerning the petition, the court has no alternative but to make an order providing for the support of the ward. We assume from this that it is your opinion that it is mandatory for the county court to make an allowance out of county funds for support under these circumstances without regard to any other facts or conditions that exist.

Section 475.370, RSMo, referred to in the opinion request, provides as follows:

"1. If the estate of any incompetent person is insufficient to pay his debts, to maintain himself and family, or educate his children, his guardian may apply to the county court of the proper county, by petition, setting forth the particulars, and praying for an appropriation from the county treasury for the support of his ward.

"2. The petition shall be accompanied by a true and perfect account of the guardianship, an inventory of the estate and effects, and a list of the debts due from such insane person, and it shall be verified by the affidavit of the petitioner.

"3. If the county court is satisfied that the estate and effects are insufficient for the purposes above specified, it may order such sum to be paid to the guardian, out of the county treasury, as to it shall appear reasonable, and cause a warrant to be issued accordingly.

"4. But no allowance shall be made, at any one time, for a period longer than one year, nor shall the order be made at any time, unless the guardian has duly accounted, and settled with the probate court, for the moneys and effects which have come to his hands for the support of his ward, out of the county treasury or otherwise." (Emphasis added)

Honorable Ronald R. McKenzie

The first question that arises under this section of the statute is whether it is mandatory the county court make an appropriation for the support of the ward when a petition for support is properly filed by the guardian and the county court is satisfied that the facts stated in the petition are true and correct.

The above-statutory provision expressly states that if the county court is satisfied that the estate and effects are insufficient for the purposes above specified, it may order such sum to be paid to the guardian, out of the county treasury, as to it shall appear reasonable to cause a warrant to be issued accordingly. It is our view that under this statutory provision it is not mandatory but a discretionary matter for the county court to determine whether an appropriation for the support of the ward is to be made, together with the amount of the appropriation, depending upon the amount of income or support the ward has available together with the financial conditions of the county and money available in the county treasury for the support of the county poor. It is our view that the right of a ward to receive support from the county under this statute is no greater than the right of any other person alleged to be in need of support by the county. The fact that the application for support is made by a guardian is not significant. Bradford v. Phelps County, 210 S.W.2d 996 (Mo. 1948).

Section 205.580, RSMo, provides as follows:

"Poor persons shall be relieved, maintained and supported by the county of which they are inhabitants."

Section 205.610, RSMo, provides as follows:

"The county court of each county, on the knowledge of the judges of such tribunal, or any of them, or on the information of any magistrate of the county in which any person entitled to the benefit of the provisions of sections 205.580 to 205.760 resides, shall from time to time, and as often and for as long a time as may be necessary, provide, at the expense of the county, for the relief, maintenance and support of such persons."

It is our opinion that under the above statutes it is the responsibility of the county court to provide for relief, maintenance, and support of persons who are in fact indigent. However,

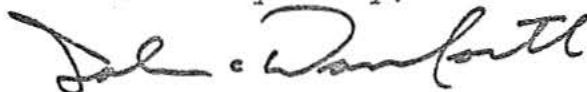
Honorable Ronald R. McKenzie

the question of indigency under the above sections and the question of relief under Section 475.370 is a matter for the determination of the county court. It should be obvious that the county cannot be required to support any person literally within the provisions of subsection 1 of Section 475.370 because, if such were the case, any such person living beyond his means could compel county aid. In our view the county court has the discretion to determine whether an appropriation should be made for an individual's support depending upon the funds available for that purpose together with the overall needs of each individual and other relevant facts. State ex rel. Becker v. Wehmeyer, 113 S.W.2d 1031 (St.L.Ct.App. 1938).

The case of Cox v. Osage County, 15 S.W. 763 (Mo. 1891), which is referred to in the opinion request, is not in point. That opinion involved the provisions of what is now Section 475.355, RSMo, which in substance provides for any judge of the court of record, other than a judge of the magistrate court, when it appears by reason of mental condition any person is so far disordered in his mind as to endanger his own person or the persons or property of others and that such person is not confined by the person having charge of him, the judge may cause such person to be apprehended and employ some person to confine him in some suitable place until a hearing may be had on an information filed in probate court, and the expenses of such confinement under this section shall be paid by the guardian out of the estate of the incompetent or a person bound to provide for and support the incompetent, or the same shall be paid out of the county treasury upon the order of the county court after the same is duly certified by the probate court. The only expenses of confinement under this statute are the expenses involved prior to a hearing in the probate court and those were the expenses under consideration in the Cox case.

We are enclosing herewith Opinion No. 14 issued by this office on May 26, 1959, to Charles M. Cable, to the effect that the county court may provide for indigent old persons by paying a private nursing home for their care and to grant supplemental aid to its indigent old in addition to that granted by the state, if the court determines it is economically expedient for the county to do so.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 14
5-26-59 Cable



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

April 10, 1974

JOHN C. DANFORTH
ATTORNEY GENERAL

OPINION LETTER NO. 139

Honorable James N. Riley
Representative, District 88
Room 402, Capitol Building
Jefferson City, Missouri 65101

Dear Representative Riley:

This is in response to your request for an opinion from this office as follows:

"Whether the City of Maplewood as a third class city is empowered under sections 94.020 R.S. Mo. and 94.080 R.S. Mo. or otherwise to enact an ordinance establishing a penalty and/or interest for the non-payment of ad valorem taxes.

"Maplewood presently has an ad valorem tax and is considering enacting a 50% penalty and/or 8% interest if permissible."

We understand that you are inquiring about an ad valorem tax on merchants.

The city of Maplewood is a third class city, and the assessment and taxation of property is governed by Chapter 94, RSMo.

Section 94.020, RSMo, to which you refer, provides as follows:

"The city council shall, from time to time, provide by ordinance for the levy and collection of all taxes, licenses, wharfage and other duties not herein enumerated, and

Honorable James N. Riley

for neglect or refusal to pay the same shall fix such penalties as are now or may hereafter be authorized by law or ordinance."

This section has been in effect in the same language since 1893. Laws of Missouri 1893, page 65.

Section 94.080, RSMo, provides as follows:

"The council shall have power to levy, and all merchants shall pay to the city collector, an ad valorem tax equal to that which is levied upon real estate; the amount of which tax shall be determined and ascertained in the same way as the state and county tax is determined and ascertained; and the collector shall have power to enforce the payment of the same by seizure and sale, as in the collection of other taxes."

This section has been in effect in the same language since 1893. Laws of Missouri 1893, page 65. In our view Section 94.080 deals with a particular subject of taxation and is applicable with respect to the merchants tax.

The tax provided for under Section 94.080 is a property tax and not a licensing tax, and the amount of the tax is to be determined and ascertained in the same way as state and county taxes are determined, and the collector is to enforce the payment of the same by seizure and sale as in the collection of other taxes. State ex rel. Carleton Dry Goods Co. v. Alt, 123 S.W. 882 (Mo. 1909).

Section 94.150, RSMo, provides as follows:

"The enforcement of all taxes authorized by sections 94.010 to 94.180 shall be made in the same manner and under the same rules and regulations as are or may be provided by law for the collection and enforcement of the payment of state and county taxes, including the seizure and sale of goods and chattels, both before and after said taxes shall become delinquent; provided, that all suits for the collection of city taxes shall be brought in the name of the state, at the relation and to the use of the city collector."

Under the above section, the enforcement of all city taxes authorized under Chapter 94 is made in the same manner and under the

Honorable James N. Riley

same rules and regulations as provided by law for the collection and enforcement and payment of state and county taxes, and all suits for the collection of city taxes is to be brought in the name of the state at the relation and to the use of the city collector.

City of Westport ex rel. Kitchen v. McGee, 30 S.W. 523 (Mo. 1895) was a suit to collect city real estate taxes for the year 1891. The court found a verdict for the plaintiff in the sum of \$175, with interest at the rate of 12% per annum. Appellant objected to the rate of interest. In discussing this question, the court stated, l.c. 525:

"2. Appellant's point as to the rate of interest charged is not well taken. Section 7605, Rev. St. Mo. 1889, provides that, as to state and county taxes, any taxpayer who fails to pay his taxes on a fixed date is chargeable by the collector with a 'penalty' (sometimes also called 'interest') of 1 per cent. per month. The statute calls this an 'additional tax' or 'penalty.' Section 1604, Id., provides that the payment of all taxes in such cities shall be enforced by collection in the same manner, and under the same rules and regulations, as may be provided by law for collecting and enforcing the payment of state and county taxes. The imposition of a penalty is a regulation for the collection of the tax, and ordinarily the most effective."
(Emphasis added)

Section 7605, RSMo 1889, is now Section 139.100, RSMo. It provides for the collector to collect an additional tax, "as penalty," the amount provided for in Section 140.100, RSMo, from any taxpayer who fails or neglects to pay the collector his taxes when due. The above case involved the collection of a city real estate tax. The question we have under consideration is the collection of a city merchants ad valorem tax.

Section 150.235, RSMo, provides:

"Any person who shall fail to pay to the collector of revenue any merchants' and manufacturers' tax on the property of such person in said county on or before the thirty-first day of December next after the same shall have been assessed and levied, such tax shall be deemed delinquent, and said delinquent taxpayer shall pay in addition to such taxes -

Honorable James N. Riley

which said taxpayer may stand charged on the tax books of such county a penalty of one percent per month plus ten percent interest, provided that such penalties shall not exceed more than ten percent per annum."

Under the above-statutory provisions, it is our opinion that in a third class city which levies an ad valorem merchants tax the amount of the tax shall be determined and ascertained in the same way as state and county taxes are determined and ascertained and that the only penalties that may be provided for the nonpayment and collection of the same are those which are provided for in the collection of state and county merchants taxes.

It is our view that a city of the third class has power under Section 94.080, RSMo, to levy a merchants tax equal to that which is levied upon real estate, the amount of which tax shall be determined and ascertained in the same way as state and county taxes are determined and ascertained and the only penalty for failure to pay the same is that which is provided for for failure to pay state and county merchants taxes under Chapter 150, RSMo.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

COURTS: A foreign judgment filed for registra-
JUDGMENTS: tion under the provisions of Supreme
CIRCUIT CLERK: Court Rule 74.79 is not a final judg-
CIRCUIT COURT: ment required to be abstracted under
FOREIGN JUDGMENTS: the provisions of Supreme Court Rules
74.76 and 74.77 until the court in
which said foreign judgment is filed for registration shall en-
ter a final judgment as provided under Rule 74.79.

OPINION NO. 140

March 27, 1974

Honorable James P. Mulvaney
Representative, District 61
Room 317, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Mulvaney:

This is in response to your request for an opinion from this office as follows:

"This question is for abstracting a foreign judgment.

"If a foreign judgment is registered in this state from another state, is it abstracted immediately in the abstract of judgments book kept by the Circuit Clerk of the county in which it has been registered, or should the Clerk of the Circuit Court wait until the final rendition of the judgment? According to our Statutes, Section 511.510, which I have enclosed for your inspection, a judgment must be abstracted five days after the rendition of any final judgment.

"Also, enclosed is our Statute Section 511.760 - Uniform enforcement of foreign judgment."

Section 511.510, RSMo, has been superseded by Supreme Court Rule 74.77, and Section 511.760, RSMo, has been superseded by Supreme Court Rule 77.79 under provisions of Supreme Court Rule 41.02. Rule 41.02 provides as follows:

Honorable James P. Mulvaney

"Rules 41 to 101, inclusive, are promulgated pursuant to authority granted this Court by Section 5 of Article V of the Constitution of Missouri and supersede all statutes and existing court rules inconsistent therewith."

Supreme Court Rule 74.77 applies only to judgments rendered by a court in a city having over 100,000 inhabitants or in a county having over 60,000 inhabitants.

Supreme Court Rule 74.76 provides that no judgment rendered by any court in a city having over 100,000 inhabitants or in any county having over 60,000 inhabitants shall be a lien on real estate situated in such city or county until an abstract of such judgment shall be entered in a book kept by the clerk of the circuit court having jurisdiction of civil causes within such city or county.

Rule 74.77 provides in part as follows:

"It shall be the duty of each of the clerks of all courts of record in such city or county, within five days after the rendition of any final judgment in their respective courts, to furnish an abstract thereof, as provided above, to the clerk of such circuit court, who shall immediately upon the same day enter the same on his abstract as aforesaid; and it shall be the duty of the clerk or clerks of the circuit courts in such counties, within five (5) days after the rendition of any final judgment in their respective courts, to prepare and enter such abstract, as above provided; . . ."

Under the rule only final judgments rendered by a court of record in such city or county are required to be abstracted under the above rules.

You inquire whether a foreign judgment registered under the provisions of Section 511.760 is to be abstracted as provided in Sections 511.500 and 511.510 immediately when it is filed for record. In other words, your question is when does a foreign judgment filed for record in a court in this state become a final judgment under Section 511.760 and to be abstracted under Sections 511.500 and 511.510. Section 511.760 has been superseded by Supreme Court Rule 74.79.

Honorable James P. Mulvaney

Supreme Court Rule 74.79, in substance, provides that any person entitled to bring an action on a foreign judgment may file a verified petition for registration of such judgment by setting forth a copy of the judgment to be registered, the date of its entry, and the record of any subsequent entries affecting it, duly authenticated in the manner authorized by law in any court of this state having jurisdiction of such action. It provides that any time after its registration a petitioner shall be entitled to have summons issued and served upon the judgment debtor. If jurisdiction of the person of the judgment debtor cannot be obtained, a notice reciting the fact of registration shall be sent by the clerk of the registering court by registered mail to the last known address of the judgment debtor. It further provides:

"(f) Levy. At any time after the registration and regardless of whether jurisdiction of the person of the judgment debtor has been secured or final judgment has been obtained, a levy may be made under the registered judgment upon any property of the judgment debtor which is subject to execution or other judicial process for satisfaction of judgments.

"(g) Final Judgment. If the judgment debtor fails to plead within thirty days after jurisdiction over his person has been obtained, or if the court after hearing has refused to set the registration aside, the registered judgment shall become a final personal judgment of the court in which it is registered.

"(h) Defenses--Counterclaims. Any defense, set-off or counterclaim which under the law of this state may be asserted by the defendant in an action on the foreign judgment, may be presented by appropriate pleadings and the issue raised thereby shall be tried and determined as in other civil actions. Such pleadings must be filed within thirty days after personal jurisdiction is acquired or within thirty-five days after the mailing of the notice prescribed in paragraph (e).

Honorable James P. Mulvaney

"(i) Appeal Pending. If the judgment debtor shows that an appeal from the original judgment is pending or that he is entitled to, and intends to appeal therefrom, the court shall, on such terms as it deems just, postpone the trial for such time as appears sufficient for the appeal to be concluded, and may set aside the levy upon proof that the defendant has furnished adequate security for satisfaction of the judgment.

"(j) Order Setting Aside Registration--Final Judgment. An order setting aside a registration constitutes a final judgment in favor of the judgment debtor.

"(k) Appeal. An appeal may be taken by either party from judgment or order sustaining or setting aside a registration on the same terms as an appeal from a judgment or order of the same court.

"(l) Quasi in Rem Judgment. If personal jurisdiction of the judgment debtor is not secured within thirty days after the levy and he has not, within thirty-five days after the mailing of the notice prescribed by paragraph (e), acted to set aside the registration or to assert a set-off or counterclaim the registered judgment shall be a final judgment quasi in rem of the court in which it is registered, binding upon the judgment debtor's interest in property levied upon, and the court shall enter an order to that effect.

"(m) Sale Under Levy. Sale under the levy may be held at any time after final judgment, either personal or quasi in rem, but not earlier except as otherwise provided by law for sale under levy on perishable goods. Sale and distribution of the proceeds shall be made in accordance with the laws of this state.

"(n) Interest--Costs. When a registered foreign judgment becomes a final judgment of this state, the court shall include as part of the judgment interest payable on the foreign judgment under the law of the state in which

Honorable James P. Mulvaney

it was rendered, and the cost of obtaining the authenticated copy of the original judgment. The court shall include as part of its judgment court costs incidental to the proceedings in accordance with the laws of this state."
(Emphasis added)

It is our opinion that a foreign judgment filed for registration in a court in this state having jurisdiction over such action under the provisions of Rule 74.79 is not a final judgment required to be abstracted under the provisions of Rules 74.76 and 74.77 until it becomes a final judgment under the provisions of Rule 74.79 in a court of this state. It is not a final judgment under the provisions of Rules 74.76 and 74.77 on the date it is filed for registration under the provisions of Rule 74.79. It is not a final judgment until it becomes a final judgment as provided for in Rule 74.79.

Rules 74.76 and 74.77 provide the method and manner in which a judgment rendered by a court in a city or county having over a certain number of inhabitants shall be a lien on real estate situated in such county or city. Under these rules, the only purpose of having such judgment abstracted is for the purpose of creating and protecting a lien on real estate in such city or county.

It is our view that a final judgment under the provisions of Rules 74.76 and 74.77 means a final judgment of the court in this state in which a foreign judgment is registered under the provisions of Rule 74.79. It does not become a final judgment when filed in a court until the court in which it is filed enters a final judgment although such judgment is a final judgment of the foreign state in which it was rendered.

A judgment in this state is not a final judgment as long as it remains under the control of the court in which it is rendered. Sterling v. Parker-Washington, 170 S.W. 1156 (St.L.Ct.App. 1914). It does not become a final judgment under Rule 74.79 until the court in which a judgment is filed for registration enters a final judgment.

CONCLUSION

It is the opinion of this office that a foreign judgment filed for registration under the provisions of Supreme Court Rule 74.79 is not a final judgment required to be abstracted under the provisions of Supreme Court Rules 74.76 and 74.77 until the court in which said foreign judgment is filed for registration shall enter a final judgment as provided under Rule 74.79.

Honorable James P. Mulvaney

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

JOHN C. DANFORTH
Attorney General



OFFICES OF THE

JOHN C. DANFORTH
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

March 6, 1974

OPINION LETTER NO. 144

Honorable Russell G. Brockfeld
Honorable Omar Schnatmeier
Honorable Fred Dyer
Honorable George P. Dames
Missouri House of Representatives
c/o House Post Office
State Capitol Building
Jefferson City, Missouri 65101

Gentlemen:

This letter is in response to your question asking:

- "1) Does the St. Charles County Regional Sewer District, as formed, comply with the statutes?
- "2) In view of the defeat of the November bond issue, what is the legal status of the District at this time?
- "3) If the District still exists, does it have the legal right to resubmit the same bond issue for voter approval? Or does it have the right to resubmit a revised bond issue for approval?"

We understand that the district was organized under Sections 204.250, RSMo Supp. 1973, et seq.

Such a district is incorporated by decree of the circuit court under Section 204.280, RSMo. We are not in a position to challenge the order of the circuit court incorporating the district and therefore, it is our view that the district has a valid and legal existence and became a body corporate and politic under Section 204.290, RSMo, when the board of trustees provided for in

Honorables Brockfeld, Schnatmeier, Dyer, and Dames

Section 204.300, RSMo, were appointed. Under Section 204.290, all courts take judicial notice of the existence of the district so organized.

In our view the defeat of the revenue bond issue at the election does not affect the organization of the district. There are no provisions for the dissolution of the district in the event the bond election fails.

In answer to your question asking whether successive bond issue elections may be held, it has been our view in similar situations respecting school levies that a school board has the authority to call repeated elections. See Opinion No. 446 dated September 4, 1970, to Harold J. Esser, copy enclosed.

Under Section 204.450, RSMo, if the proposition for the issuance of revenue bonds to fund the construction of the system is defeated, the board of trustees of the district may levy and assess a special tax upon all real property to pay the cost of the proceedings incorporating the district, the preparation of the plan for the trunk sewer and treatment system, the conduct of the elections in the district, and the necessary expenses of the district from the time of its incorporation until the bond election. Section 204.360, RSMo, provides that other funds, as enumerated therein, may be used for the cost of any common sewer district of acquiring, constructing, improving or extending a sewer system.

We find no prohibition against holding further revenue bond elections. We conclude that, in the absence of such a prohibition, successive revenue bond issue elections may be held and that the same proposition or different propositions respecting the same may be submitted so long as there is no abuse in the exercise of such authority.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 446
9-4-70, Esser



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

March 5, 1974

JOHN C. DANFORTH
ATTORNEY GENERAL

OPINION LETTER NO. 147

Honorable Harold Dickson
Representative, District 112
Room 202G, Capitol Building
Jefferson City, Missouri 65101

Dear Representative Dickson:

This letter is in answer to your question which asks:

"When a school election is held in conjunction with municipal elections under provisions of Section 162.071, RSMo, what public officer or officers should retain custody of the ballots after the ballots have been counted."

We enclose Opinion No. 210 dated June 2, 1970, to Gilmore, which is self-explanatory. We believe that the reasoning in that opinion is applicable in the premises and that the county clerk is to have custody of the ballots after the ballots have been counted in accordance with Section 111.581, RSMo, which is quoted on pages 5-6 of said opinion.

We caution you, however, that there may be special statutes which govern in particular instances, such as Section 162.561, RSMo, relative to urban school district special elections, which expressly provides that in such elections the ballots shall be sealed, packaged and delivered to the secretary of the board of directors of the urban district where they shall be safely preserved.

Very truly yours,

A handwritten signature in cursive script, reading "John C. Danforth", is written over the typed name.

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 210
6-2-70, Gilmore



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

March 6, 1974

OPINION LETTER NO. 148

Honorable W. O. Howard
Representative, District 49
Room 414, Capitol Building
Jefferson City, Missouri 65101

Dear Representative Howard:

This letter is in answer to your question asking:

"Does HJR #90, in any way, create a sub-class of Class 1 property as set out in Article X, Sec. 4(a) of the Missouri Constitution."

For reference purposes, we have marked House Joint Resolution No. 90 "Exhibit A" and attached a copy hereto.

In our view, it is settled law that an amendment to the Constitution will prevail over the original instrument. This rule was quoted with approval by the Missouri Supreme Court in State ex rel. Lashly v. Becker, 235 S.W. 1017, 1020 (Mo. Banc 1921), thus:

"'A clause in a constitutional amendment will prevail over a provision of the original instrument inconsistent with the amendments, for an amendment to the Constitution becomes a part of the fundamental law, and its operation and effect cannot be limited or controlled by previous Constitutions or laws that may be in conflict with it.' 12 C. J. pp. 709, 724; Grant v. Hardage, 106 Ark. loc. cit. 509, 153 S. W. 826."

Honorable W. O. Howard

Therefore, if there is any conflict the amendment controls.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a prominent initial "J" and a long, sweeping underline.

JOHN C. DANFORTH
Attorney General

Attachment

EXHIBIT A

HOUSE COMMITTEE SUBSTITUTE

FOR
HOUSE JOINT RESOLUTION NO. 90

JOINT RESOLUTION

Submitting to the qualified voters of Missouri, an amendment to Article X of the constitution of Missouri relating to taxation by adopting one new section relating to the same subject.

BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES, THE SENATE CONCURRING THEREIN:

That at the next general election to be held in the state of Missouri, on Tuesday next following the first Monday in November, 1974, or at a special election to be called by the governor for that purpose, there is hereby submitted to the qualified voters of this state, for adoption or rejection, the following amendment to Article X of the constitution of the state of Missouri:

Section 1. Article X, constitution of Missouri, is amended by adding one new section thereto, to be known as section 7 (a), to read as follows:

Section 7(a). The general assembly by general law may provide for the valuation, assessment and taxation of land actively devoted to agricultural or horticultural use, by any method, for any period of time, and upon any term, condition or restriction as the general assembly may prescribe.

April 23, 1974

OPINION LETTER NO. 154
Answer by letter-Blackmar

Honorable Kenneth J. Rothman
Representative, District 77
Room 308, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Rothman:

This letter is in response to your request for an opinion on the following question:

"Whether under 12 USC Section 85 whereby a national bank is permitted to charge the state interest rate or 1% above the Federal Reserve Discount rate, whichever is higher, does this mean that the amount of interest charged on a loan would remain constant throughout the period of the loan or would it fluctuate as the discount rate might go up or down?"

In Opinion No. 343, November 21, 1973, to you, we held that Congress had the power to specify, notwithstanding state law, the rate of interest national banks may charge and that Congress had done so in 12 U.S.C. §85. That section provides in pertinent part to this request as follows:

"Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate of ninety-day commercial paper in effect at the Federal Reserve Bank in the Federal reserve district where the bank is

Honorable Kenneth J. Rothman

located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this title. . . ."

The question you asked is one of federal law and we find no recorded decisions directly in point. It is our view that when a national bank makes a loan at a rate in excess of that permitted by state law, but at a rate not more than 1% above the discount rate then in effect, the bank may continue to receive interest at the contracted rate even though the discount rate declines during the course of the loan. We believe that had Congress intended that the rate on the loan fluctuate with changes in the discount rate it could have so stated in express language.

In conjunction with your opinion request, we have contacted the Office of the Comptroller of the Currency. That office is responsible for administering the National Bank Act, 12 U.S.C. §38, et seq., and the supervision of national banks. The Comptroller's Office has advised us that while the office has issued no official rulings on the question you have presented, it has advised several national banks by letter that with respect to loans made at rates above state usury rates, but not more than 1% above the discount rate in effect at the time when the loan is made, the bank may continue to receive interest at the rate contracted for in the event the discount rate declines during the course of the loan to a point where the rate on the loan is in excess of 1% above the then existing discount rate. We enclose a copy of a letter sent by Kenneth W. Leaf, Chief National Bank Examiner, under date of November 13, 1973, to the Executive Director of the Mississippi Bankers Association so holding.

It is our view that a national bank making a loan at a rate that is not more than 1% above the discount rate on ninety-day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve District where the bank is located may continue to receive interest at such rate during the course of the loan even though the discount rate may decline during the course of the loan to a point where the rate charged on the loan is in excess of 1% above the discount rate and the rate charged on the loan would be usurious under state law.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure



OFFICES OF THE

JOHN C. DANFORTH
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

July 18, 1974

OPINION LETTER NO. 158

Mr. Carl Noren, Director
Department of Conservation
Post Office Box 180
Jefferson City, Missouri 65101

Dear Mr. Noren:

This is in reply to your request for an opinion of this office concerning the question whether in the state of Missouri water rights accompany ownership of land in fee under the riparian doctrine, unless specifically noted otherwise in the deed. We understand the question is prompted by a request for such opinion by the Bureau of Sport Fisheries and Wildlife of the United States Department of the Interior which shares the cost for some land acquisitions by the Conservation Commission.

Actually, it appears that the question is whether the riparian doctrine is followed in Missouri, for under the doctrine an owner in fee on a watercourse has riparian rights. In Armstrong v. Westroads Development Company, 380 S.W.2d 529, 537 (St.L.Ct.App. 1964), the court stated:

" . . . A riparian owner is an owner of land bounded by a watercourse or through which a stream flows, and generally only such an owner may claim or exercise riparian rights which are those rights pertinent only to lands which actually touch on the watercourse or through which the watercourse flows. . . . It is equally well settled that riparian rights are not available to those who do not own or control riparian land, and riparian land must be in actual contact with the waters, proximity without contact being insufficient. . . ."

And, in 93 C.J.S. Waters §216, it is stated:

Mr. Carl Noren

"An unrestricted conveyance of land will ordinarily pass as appurtenances all water rights and privileges which are incident to the situation of the land as riparian to a stream or other body of water, or which are at the time rightfully used in connection with the land and necessary to its beneficial enjoyment. . . ."

Thus, the riparian right, which is a right to the usufruct inherent in the land (93 C.J.S. Waters §5), accompany ownership of land in fee.

In Attorney General's Opinion No. 59, April 30, 1954, McMurtry, this office said:

"We shall not here enter into any course of reasoning in an attempt to show that the riparian doctrine does prevail in Missouri. Our courts have always held that the riparian doctrine did prevail in Missouri, and we likewise so hold. . . ."

Accordingly, it is the opinion of this office that in the state of Missouri water rights accompany ownership of land in fee under the riparian doctrine, unless specifically noted otherwise in the deed.

Yours very truly,

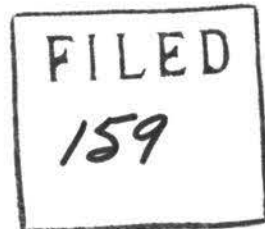


JOHN C. DANFORTH
Attorney General

April 5, 1974

OPINION LETTER NO. 159
Answer by letter-Wieler

Honorable James I. Spainhower
State Treasurer
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Spainhower:

This is in response to your request for an opinion as to the authority of the State Treasurer to transfer moneys from general revenue to the state road fund without an appropriation by the General Assembly.

This question arises as a result of a lawsuit instituted by the Missouri State Highway Commission against the State Treasurer in the Circuit Court of Cole County. In their petition, the Highway Commission asked the circuit court to direct the Treasurer to credit to the state road fund, from other funds in the treasury which have received interest, all of the interest earned from the state road fund since September 21, 1967. The circuit court agreed with the contentions raised by the Highway Commission and ruled that interest earned from the moneys in the state road fund belong to that fund. The court then stated that, if this ruling were not overturned on appeal, the parties should proceed to an accounting to determine the amounts which should be properly credited to the state road fund and which were deposited by the Treasurer in other funds.

On appeal, the ruling of the circuit court was upheld by the Supreme Court of Missouri, stating:

"The judgment is affirmed and the cause remanded for the accounting prayed in Count II and determination of the amounts due the state road fund heretofore credited by the

Honorable James I. Spainhower

State Treasurer to general revenue." State Highway Commission of Missouri v. Spainhower,
504 S.W.2d 121, 127 (Mo. 1973)

The question then is whether or not the courts have the authority to direct the State Treasurer to transfer these funds in the absence of an appropriation from the General Assembly. In our opinion, they do. Article IV, Section 15 of the Missouri Constitution requires the State Treasurer to hold all moneys for the benefit of the respective funds to which they belong. This constitutional mandate has been placed in the statutes in Section 30.240, RSMo 1969, and Section 33.080, RSMo 1969, which require the State Treasurer to hold all state moneys for the benefit of the respective funds to which they belong and to place moneys in the state treasury to the credit of the particular purpose or fund for which collected.

The Supreme Court in the Spainhower case has determined that interest earned from highway funds must be deposited to that fund. There can be no question of interference with another branch of government by ordering transfer of interest earned from 1967 to the present because said moneys will not be withdrawn from the state treasury. Article IV, Section 28 of the Missouri Constitution, as amended in 1972, requires that "No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law, . . ." This, of course, is a restriction which not even the courts could circumvent. However, as stated before, the money in this case will not be withdrawn from the state treasury but merely transferred from one account to another.

Both the Circuit Court of Cole County and the Supreme Court of this state have already said that interest moneys earned from the state road fund belong to that fund. It is the duty of the State Treasurer to keep all moneys in their proper funds. Accordingly, we believe that the court has the power to order the State Treasurer to return to the state road fund all of the interest earned from the investment of that fund since September 21, 1967, in accordance with the prayer for relief by the Highway Commission, once the amount of interest is definitely established. An order to this effect from the courts is binding upon the State Treasurer and no legislative action is necessary to complete or provide for such a transfer.

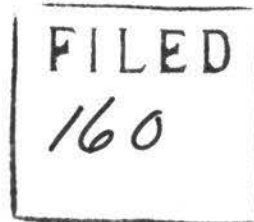
Yours very truly,

JOHN C. DANFORTH
Attorney General

March 18, 1974

OPINION LETTER NO. 160
Answer by Letter - Wieler

Honorable Raymond Howard
State Senator, District 5
Room 428B, Capitol Building
Jefferson City, Missouri 65101



Dear Senator Howard:

This is in response to your request for an opinion as to the necessity of legislative action in order to reestablish a law school at Lincoln University.

It is our understanding that Lincoln University has asked for an increase in appropriations for this year to cover the cost of determining the feasibility of re-establishing a law school.

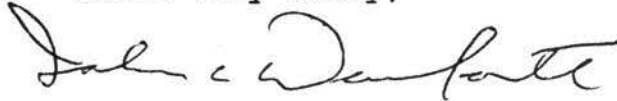
In our opinion, specific legislation would not be necessary to enable Lincoln University to establish such a school. This power already resides with the Board of Curators pursuant to Section 175.050, RSMo 1969, which provides as follows:

"The board of curators of the Lincoln university shall be authorized to afford to its students training up to the standard furnished at the state university of Missouri. To this end the board of curators shall be authorized to purchase necessary additional land, erect necessary additional buildings, to open and establish any new school, department or course of instruction, to provide necessary additional equipment, and to locate the respective units of the university wherever in the state of Missouri in their opinion the various schools will most effectively promote the purposes of this chapter."

Honorable Raymond Howard
November 27, 1974
Page 2

eliminate any possibility of being misleading. This letter is being attached to our earlier opinion letter as an addendum.

Yours very truly,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH
Attorney General

OPINION NO. 161

FILED
161

Dear Dr. Robb:

Section 37(a) provides:

Senate Bill No. 1 (CCSHCSSCSSB No. 1) provides in pertinent part:

"Section 9. 1. There is hereby created a department of mental health to be headed by a mental health commission who shall appoint a director, by and with the advice and consent of the senate. . . ." (Emphasis added).

Harold P. Robb, M.D., Director

It appears clear that there is a literal conflict between the first sentence of Section 9.1 of the bill and the first sentence of Section 37(a) in that the constitutional provision provides that the department "shall be in charge of a director" [sic] and the reorganization bill provides that the department "be headed by a mental health commission."

The terminology used in Section 37(a) is not unique. Similar language was employed in Section 22, Article IV, repealed by the amendments to Article IV of the Missouri Constitution, which provided that "[t]he department of revenue shall be in charge of a director of revenue," The Constitutional Debates respecting repealed Section 22, Article IV, indicate that the Constitutional Convention used the language "head of" as interchangeable with "in charge of" in discussing the powers of constitutional department directors. Debates, Second Typing, pages 4507-4558. By comparison, new Section 22, Article IV with respect to the Department of Revenue similarly provides that "[t]he department of revenue shall be in charge of a director of revenue. . . ."

Similarly, "[t]he department of agriculture shall be in charge of a director. . . ." Section 35, Article IV; "[t]he department of consumer affairs, regulation and licensing shall be in charge of a director" Section 36(a), Article IV; there "shall be established a department of social services in charge of a director" Section 37, Article IV; "[t]he department of natural resources shall be in charge of a director" Section 47, Article IV; "[t]he department of public safety shall be in charge of a director" Section 48, Article IV; "[t]he office of administration shall be in charge of a commissioner of administration," Section 50, Article IV.

We note that other sections in Article IV expressly provide that some commissions or boards are given control or some measure of control of a department. Cf., Section 32(a) respecting the Department of Transportation; Section 40(a) respecting the Conservation Commission; Section 49 respecting the Department of Labor and Industrial Relations.

Further it appears that the word "head" is used throughout such constitutional provisions as referring to the person, board or commission in charge of such departments. Section 12, Article IV, provides that:

". . . The general assembly may create by law one department, in addition to those named, provided that the department shall be headed

Harold P. Robb, M.D., Director

by a director or commission appointed by the governor on the advice and consent of the senate. . . ." (Emphasis added)

and that:

". . . The director or commission shall have administrative responsibility and authority for the department created by law. . . ."
(Emphasis added)

Section 17 refers to "heads of all the executive departments" (Emphasis added). Sections 51 and 53 speak of department and division "heads." Thus, clearly those having charge of departments are considered the heads of the departments.

In view of the explicit language of Section 37(a), Article IV, we must conclude that the director of such department will be not only in charge of the department but will also necessarily be the head of the department notwithstanding the provision of Senate Bill No. 1 to the contrary. Therefore, Senate Bill No. 1 is to that extent unconstitutional.

The invalidity of this provision does not affect the remainder of Senate Bill No. 1 because such provision is severable. Section 1.140, RSMo.

CONCLUSION

It is the opinion of this office that the new Department of Mental Health, to be established pursuant to Section 37(a), Article IV, Missouri Constitution and Senate Bill No. 1, 77th General Assembly, First Extra Session, will be under the control of the director of such department. The provision of Senate Bill No. 1, which purports to vest the control of such department in a State Mental Health Commission, is invalid.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Yours very truly,



JOHN C. DANFORTH
Attorney General



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

September 16, 1974

OPINION LETTER NO. 162

Mr. Robert L. James, Commissioner
Office of Administration
State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. James:

This letter is in response to your question asking:

"Can the Federal Soldiers' Home under authority of 191.160, RSMo. 1969, provide a cash payment directly to the Superintendent and Assistant Superintendent for 'board and living quarters' or may board and living quarters be provided only?"

Section 191.160, RSMo 1969, provides:

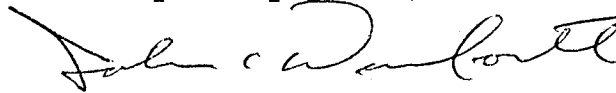
"The department of public health and welfare may provide any employee in any institution under its control with board and living quarters in addition to salary, or wages, when the director shall determine that it is for the best interest of the state to do so."

This provision, then, authorizes living quarters for such employees when it is determined that it is for the best interest of the state. In our view this does not authorize cash in lieu of living quarters. This view is based on and consistent with our holding in Opinion No. 94, dated June 26, 1953, to Weber, in which we held that a county court had statutory authority (under a now repealed statute) to furnish living quarters for a sheriff but that the sheriff

Mr. Robert L. James, Commissioner

could not be paid cash in lieu of living quarters. We still adhere to this opinion and that conclusion is applicable here. Accordingly, cash in lieu of living quarters cannot be paid under Section 191.160.

Very truly yours,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH
Attorney General

FAIRS: The gross receipts of the State Fair,
STATE FAIR: derived from the sale of admission
COUNTY FAIRS: tickets, are subject to Missouri sales
TAXATION (EXEMPTION): tax. The gross receipts from the sale
TAXATION (SALES & USE): of admission tickets to county fairs
sponsored by fair associations, or by
4-H Extension Councils, are exempted from sales tax by Senate
Bill No. 607, 77th General Assembly (1974). Sales of tickets
to county fairs sponsored by other types of private organizations
are exempted from sales tax by Section 144.040.1, RSMo, as amended
by House Bill No. 1593, 77th General Assembly (1974), only if the
sponsoring organizations are charitable organizations.

OPINION NO. 163

June 13, 1974

Mr. James R. Spradling
Director of Revenue
Department of Revenue
Jefferson State Office Building
Jefferson City, Missouri 65101



Dear Mr. Spradling:

This official opinion is issued in response to your request for a ruling on whether the gross receipts of the Missouri State Fair and county fairs are subject to Missouri sales tax. You have stated the following facts with regard to the question:

"The Department of Revenue has never collected sales tax on the gross receipts of the Missouri State Fair. Whether this practice has resulted from a policy decision or an oversight is uncertain; whatever its origin, however, the Department is now of the opinion that this practice is erroneous and that sales tax should be collected on the gross receipts of the Fair.

"In the case of county fairs there is, no doubt, some confusion caused by the fact that while the receipts from sales to political subdivisions of the State of Missouri are exempt from sales tax, the receipts from sales made by these political subdivisions are not necessarily exempt from sales tax."

Mr. James R. Spradling

We understand your question to refer to gross receipts from the sale of admission tickets to the fairs. Sales by individual concessionaires are an entirely separate matter. See our Opinion No. 544, Ryan, December 31, 1970, which held that both state and city sales tax must be collected on sales by individual concessionaires. A copy of Opinion No. 544 is attached hereto.

There appears to be some confusion about the significance of the "isolated or occasional sale" referred to in Section 144.010.1(2), RSMo 1969, as not subject to the Missouri sales tax. Such sales are mentioned merely as statutory exceptions to the general definition of taxable "business," under which they might otherwise fall. But the State Fair and county fairs do not come within this exception for occasional activities. See Opinion No. 31, Burns, May 5, 1971, attached hereto.

1. The State Fair

Missouri's state sales tax is imposed ". . . upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state. . . ." Section 144.020, RSMo 1973 Supp. Both this section and Section 144.010.1(8), RSMo 1969, defining a "sale at retail," specifically apply to sales of admission tickets to places of amusement, entertainment, and recreation. Thus, the gross receipts of the State Fair would be subject to the sales tax, unless specifically exempted by some other statutory provision, because the fair--although established for the purpose of ". . . encouraging the development of agricultural, horticultural, mechanical, mineral, stock raising and all other industrial interests of the state of Missouri, . . ." (Section 262.220.1, RSMo 1969)--is in our opinion conducted in a manner which also renders it a place of amusement, entertainment, and recreation. It is as much a carnival as an agricultural exposition, encompassing rides, games, races, and vaudeville.

We note that Section 144.010.1(5) specifically includes the state and its political subdivisions within the definition of "persons" whose activities may be subject to the sales tax. We further note that no specific exemption from the sales tax law applies to sales of admission tickets to the State Fair. Therefore, we conclude that such sales are subject to the sales tax.

2. County Fairs

Senate Bill No. 607, 77th General Assembly (1974), was signed by the Governor on May 9, 1974, and became effective immediately by

Mr. James R. Spradling

virtue of its emergency clause. It provides, in pertinent part, as follows:

"In addition to the exemptions provided by the provisions of sections 144.030 and 144.040, RSMo, there shall also be exempted from the provisions of chapter 144, RSMo, all ticket sales made by benevolent, scientific and educational associations which are formed to foster, encourage, and promote progress and improvement in the science of agriculture and in the raising and breeding of animals, . . ."

County fairs in the various counties of Missouri are sponsored by different types of public and private organizations. Some of these organizations receive financial assistance from the state to conduct the fairs under Section 262.450, RSMo 1969, or from counties pursuant to Section 262.500, RSMo 1969. The majority of these organizations are associations organized for the specific purposes of conducting the fairs, or 4-H Extension Councils. However, a few of the fairs are conducted by nonprofit civic organizations such as the Junior Chamber of Commerce and the Lions Club.

It is clear that the fair associations and the 4-H Extension Councils which sponsor county fairs come within the above-quoted statutory language and are, therefore, entitled to sales tax exemptions for their sales of admission tickets to the fairs. They are benevolent, scientific, or educational in character and their purposes obviously are the ones specified by the statute. The other civic organizations which sponsor county fairs, however, may not have been ". . . formed to foster, encourage, and promote progress and improvement in the science of agriculture and in the raising and breeding of animals, . . ." If these objectives are not among the stated purposes of the sponsoring organizations, the specific sales tax exemption of Senate Bill No. 607 would be inapplicable to ticket sales by such organizations.

However, the general charitable exemption of Section 144.040.1, as amended by House Bill No. 1593, 77th General Assembly (1974), signed by the Governor and made effective May 7, 1974, by virtue of its emergency clause, may still exempt such sales, if the sponsoring organizations are in fact charitable, because the county fairs are charitable or educational "functions or activities" within the meaning of that statutory provision:

"In addition to the exemptions under section 144.030, there shall also be exempted from the provisions of sections 144.010 to 144.510

Mr. James R. Spradling

all sales made by or to religious and charitable organizations or institutions in their religious, charitable or educational functions and activities and all sales made by or to all elementary and secondary schools operated at public expense in their educational functions and activities."

See Community Memorial Hospital v. City of Moberly, 422 S.W.2d 290, 295 (Mo. 1967).

". . . a gift for the advancement of . . . agricultural knowledge, . . . is a valid charitable gift. . . .

". . . Education comprehends in its broadest significance the acquisition of all knowledge tending to develop and train the individual and when used in this sense is not limited to the years of adolescence or to instruction in the schools. Gifts for the promotion of science, learning, and useful knowledge by other means than schools or colleges, . . . are equally public and charitable. . . ." 14 C.J.S. Charities §15, p. 446.

We conclude, therefore, that admission tickets to county fairs which are conducted by civic organizations other than fair associations, or 4-H Extension Councils, are also exempt from the Missouri sales tax if such organizations are themselves charitable.

CONCLUSION

Therefore, it is the opinion of this office that the gross receipts of the State Fair, derived from the sale of admission tickets, are subject to Missouri sales tax. The gross receipts from the sale of admission tickets to county fairs sponsored by fair associations, or by 4-H Extension Councils, are exempted from sales tax by Senate Bill No. 607, 77th General Assembly (1974). Sales of tickets to county fairs sponsored by other types of private organizations are exempted from sales tax by Section 144.040.1, RSMo, as amended by House Bill No. 1593, 77th General Assembly (1974), only if the sponsoring organizations are charitable organizations.

Mr. James R. Spradling

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mark D. Mittleman.

Yours very truly,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 544
12-31-70, Ryan

Op. No. 31
5-5-71, Burns

July 9, 1974

OPINION LETTER NO. 164
Answer by letter-Mittleman

Mr. James R. Spradling
Director of Revenue
Department of Revenue
Jefferson State Office Building
Jefferson City, Missouri 65101



Dear Mr. Spradling:

This official opinion is issued in response to your request for a ruling on the following question:

"Are organizations such as, for example, neighborhood festivals, drama clubs, symphony orchestras, art clubs, kennel clubs, riding clubs and model train clubs required to remit Missouri sales tax on the gross receipts collected from activities which they sponsor?"

You have stated the following facts in connection with this question:

"Although sales tax is collected in many instances on the gross receipts of neighborhood festivals, drama club productions, symphony orchestra presentations, etc., the Director of Revenue has found a widespread uncertainty on the part of taxpayers as to the applicability of Missouri Sales Tax to these events. This uncertainty is based on more than a mere ingrained suspicion of tax laws. Many taxpayers, being generally aware of the charitable exemption granted in Missouri sales tax law, expect that the non-profit status of a festival, artistic organization, or hobby

Mr. James R. Spradling

club brings these groups within the charitable exemption. The usually extended lengths of time between events sponsored by these organizations misleads some taxpayers into thinking that the receipts from these events are not subject to sales tax under the theory of the 'occasional sale'."

In answer to your question, we note that the exemption from the Missouri sales tax accorded to "occasional sales" would not ordinarily be available to the organizations which you describe, if these organizations exist on a continuing basis and engage in activities which fall within the scope of the sales tax law in the regular course of their operation. The exemption for isolated or occasional sales has its source in Section 144.010.1(2), RSMo 1969, which defines the term "business" in the sales tax law as follows:

" . . . any activity engaged in by any person, or caused to be engaged in by him, with the object of gain, benefit or advantage, either direct or indirect, and the classification of which business is of such character as to be subject to the terms of sections 144.010 to 144.510. The isolated or occasional sale of tangible personal property, service, substance, or thing, by a person not engaged in such business does not constitute engaging in business, within the meaning of sections 144.010 to 144.510." (Emphasis added.)

We believe that the infrequency of sales transactions is not necessarily determinative of whether sales are isolated or occasional within the meaning of this statutory provision. A more appropriate test is the regularity with which such sales activities take place among the functions of the organization which engages in them. See our Opinion No. 31, Burns, May 5, 1971, copy of which is attached hereto.

The principal issue raised by your question is whether the activities of the above-mentioned organizations qualify for sales tax exemptions under Section 144.040.1, RSMo 1973 Supp., as amended by House Bill No. 1593, 77th General Assembly (1974), signed by the Governor and effective by virtue of its emergency clause on May 7, 1974. This section provides as follows:

"In addition to the exemptions under section 144.030, there shall also be exempted from the provisions of sections 144.010 to 144.510

Mr. James R. Spradling

all sales made by or to religious and charitable organizations and institutions in their religious, charitable or educational functions and activities and all sales made by or to all elementary and secondary schools operated at public expense in their educational functions and activities." (Emphasis added.)

The recent opinion of the Supreme Court of Missouri in the case of St. John's Medical Center v. Spradling, No. 58191 (Mo. June 10, 1974) has interpreted this statute by focusing its analysis on the nature of the charitable organization and the purposes to which its income is devoted, rather than the character of its specific sales activities. If the organization itself is charitable and the income from its sales activities is devoted to its charitable purposes, those activities will be exempt from sales taxation.

We would point out that the term "charitable" is ordinarily interpreted liberally. See Community Memorial Hospital v. City of Moberly, 422 S.W.2d 290, 295 (Mo. 1967). In 14 C.J.S. Charities §12, pp. 439-441, we find the following descriptions:

" . . . To constitute a charitable use or purpose, it must be a public as distinguished from a private one; it must be for the public use or benefit; and it must be for the benefit of the public at large, or of a portion thereof, or for the benefit of an indefinite number of persons. . . .

"Charitable uses take such varied forms that a specific enumeration of the classes or objects is necessarily defective, and they cannot be limited by any narrow and stated formula . . . A charitable use, where neither law nor public policy forbids, may be applied to almost anything that tends to promote the well-doing and well-being of social man. In its legal sense, charity comprises four principal divisions: (1) Trusts for the relief of poverty and distress; (2) trusts for the advancement of education; (3) trusts for the advancement of religion; and (4) trusts for other purposes beneficial to the community not falling under any of the preceding heads."

Mr. James R. Spradling

In Defenders' Townhouse, Inc. v. Kansas City, 441 S.W.2d 365, 370 (Mo. 1969), it was also noted that:

" . . . '(o)ne ground on which a statute exempting charitable institutions from taxation can be justified in the constitutional sense is that these institutions administer to human and social needs, which the state itself might and does undertake to do, so that the ultimate obligation of the state is thus discharged by the private charity.' . . ."

Under these tests we believe that, among the organizations you have mentioned, drama clubs, symphony orchestras, and art clubs would ordinarily qualify as charitable organizations, from our understanding of their usual activities and purposes. We note that the activities of some such organizations have been supported by the Missouri State Council on the Arts. Section 185.040, RSMo, which describes the duties of the State Council on the Arts, clearly indicates that it is the policy of the state of Missouri to encourage such activities. That section provides as follows:

"The duties of the council shall be:

(1) To stimulate and encourage throughout the state the study and presentation of the performing and fine arts and public interest and participation therein;

(2) To make such surveys as may be deemed advisable of public and private institutions engaged within the state in artistic and cultural activities, including, but not limited to, music, theater, dance, painting, sculpture, architecture, and allied arts and crafts, and to make recommendations concerning appropriate methods to encourage participation in and appreciation of the arts to meet the legitimate needs and aspirations of persons in all parts of the state;

(3) To take such steps as may be necessary and appropriate to encourage public interest in the cultural heritage of our state and to expand the state's cultural resources; and

(4) To encourage and assist freedom of artistic expression essential for the well-being of the arts."

Mr. James R. Spradling

An art museum has been held to constitute a charity in this state. Parsons v. Childs, 136 S.W.2d 327, 330 (Mo. 1939).

It is difficult to see how kennel clubs, riding clubs, and model train clubs could be regarded as charitable organizations. These hobby and recreation organizations apparently are intended to serve primarily their own members rather than the public at large, and we have found no authority which would lead us to believe that their purposes are charitable, even within a liberal construction of that term.

We express no opinion as to the taxability of neighborhood festivals, in the absence of a more detailed description of their particular purposes and activities.

Therefore, it is our view that drama clubs, symphony orchestras, and art clubs ordinarily are exempted from the requirements of collecting and remitting Missouri sales tax on the gross receipts of the activities which they sponsor, if the income from these activities is devoted to the charitable purposes of such organizations. Kennel clubs, riding clubs, and model train clubs are not so exempted from the Missouri sales tax law.

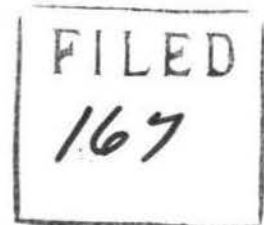
Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 31
5-5-71, Burns

May 6, 1974

OPINION LETTER NO. 167
Answer by letter-Wieler



Honorable James I. Spainhower
State Treasurer
State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Spainhower:

This is in response to your request for an opinion as to whether or not interest earned from moneys in the Conservation Commission fund should be credited to that fund or credited to general revenue.

Article IV, Section 43 of the Missouri Constitution provides as follows:

"The fees, moneys, or funds arising from the operation and transactions of the commission and from the application and the administration of the laws and regulations pertaining to the bird, fish, game, forestry and wildlife resources of the state and from the sale of property used for said purposes, shall be expended and used by the commission for the control, management, restoration, conservation and regulation of the bird, fish, game, forestry and wildlife resources of the state, including the purchase or other acquisition of property for said purposes, and for the administration of the laws pertaining thereto, and for no other purpose."

Article IV, Section 15 of the Missouri Constitution, in pertinent part, provides:

Honorable James I. Spainhower

" . . . All revenues collected and moneys received by the state from any source whatsoever shall go promptly into the state treasury, and all interest, income and returns therefrom shall belong to the state. Immediately on receipt thereof the state treasurer shall deposit all moneys in the state treasury to the credit of the state . . . and he shall hold them for the benefit of the respective funds to which they belong and disburse them as provided by law"

In our opinion, the recent case of State Highway Commission v. Spainhower, 504 S.W.2d 121 (Mo. 1973) is dispositive of the question raised. In that case, the Supreme Court of Missouri said that interest earned from the state road fund must be credited to that fund and not to general revenue. This decision was based upon a finding that the people of Missouri intended such a result by adopting Article IV, Section 30(b) of the Missouri Constitution which provides for the state road fund and directs that no use be permitted of the fund except for enumerated state highway purposes. See State Highway Commission v. Spainhower, supra at 125.

This reasoning applies equally to the question at hand. By adopting Article IV, Section 43, the people of this state have expressed a desire that all funds arising from the operations of the Conservation Commission be set aside and used only for conservation purposes. This being so, the Spainhower case would require all interest earned from moneys in the Conservation Commission fund to be transferred to that fund.

Therefore, it is our opinion that interest earned from moneys in the Conservation Commission fund should be credited by the State Treasurer to that fund rather than to the general revenue of the state.

Yours very truly,

JOHN C. DANFORTH
Attorney General

July 11, 1974

OPINION LETTER NO. 169
Answer by letter-Klaaffenbach

Honorable James F. McHenry
Prosecuting Attorney
Cole County
Room 400, Courthouse
Jefferson City, Missouri 65101



Dear Mr. McHenry:

This letter is in response to your question asking:

"If a second class county has an agreement with the State under the State-Local Technical Services Act, Sections 67.330 to 67.390 RSMo for the purchase of supplies and equipment, is such county required to advertise for bids for supplies and equipment covered by such agreement."

Section 67.360, RSMo, which authorizes the use of state procurement services by the political subdivisions provides:

"The political subdivisions of the state of Missouri are authorized to utilize such services as may be provided by the procurement section of the state division of budget and comptroller, within the limits of the appropriation of that state agency for this purpose. The governing bodies of the state's political subdivisions may require all offices and individuals of their political subdivision to conform to the requirements, as promulgated by the governing body of the political subdivision involved in the purchasing agreement entered into with the state agency. Governing bodies of all political subdivisions of

Honorable James F. McHenry

the state are hereby authorized to enter into agreements with the state agency covering the purchase of materials, supplies and equipment meeting their legal needs and are authorized to delegate to the state agency such functions relating to the purchases as shall be covered by the cooperative agreement with the state agency."

The procurement section referred to is now within the Office of Administration by virtue of the provisions of Section 26.300, RSMo 1973 Supp.

Section 50.760, RSMo 1973 Supp., which is substantively similar to repealed Section 50.760, RSMo 1969, as it relates to second class counties, requires advertisement for bids for purchases with exceptions relating to situations where supplies are exhausted or where because of the peculiar nature of the article or the amount required the same may not be included in such advertisement for bids. Section 50.760, however, is completely separate and apart from the "State-Local Technical Services Act."

Under Section 67.360, it was the intent of the General Assembly to allow centralized procurement of equipment and the like required by such political subdivisions through the state agency. When such political subdivision has entered into such an agreement with the state agency and has complied with the requirements for such purchases, Section 50.760 is not applicable and purchases may be made pursuant to Section 67.360 without bids.

Yours very truly,

JOHN C. DANFORTH
Attorney General

March 27, 1974

OPINION LETTER NO. 170
Answer by letter-Klaffenbach

Honorable Keith Barbero
Representative, District 54
Room 101D, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Barbero:

This letter is in answer to your question asking whether Section 5 of House Bill No. 1798, which is presently pending in the Second Regular Session of the 77th General Assembly, is constitutional. Such section provides:

"5. No bank, trust company or bank holding company organized or based in any other state or county [sic] shall operate any business of any kind from an office in this state, directly or indirectly, unless the office was in operation on January 1, 1973, or unless it is proved affirmatively that such operation supplies a function or service not furnished by any company or other supplier located within this state and its application to operate in this state has been approved by the commissioner of finance."

It is a well-settled principle of constitutional construction that only when there is a clear conflict between a legislative enactment and the Constitution are the courts warranted in declaring the law to be void. In the Matter of Burris, 66 Mo. 442, 450 (1877); Borden Company v. Thomason, 353 S.W.2d 735, 743 (Mo. 1962).

Although the bill is pending and is not law, we believe that this general principle of construction is applicable. In addition,

Honorable Keith Barbero

bearing in mind that you require an immediate response to your question, we have narrowed our analysis of the constitutional considerations involved to the prohibition against retrospective legislation which is found in Section 13, Article I of the Missouri Constitution.

In Graham Paper Co. v. Gehner, 59 S.W.2d 49, 50 (Mo. Banc 1933), the Missouri Supreme Court stated that:

"In Bartlett v. Ball, 142 Mo. 28, 36, 43 S.W. 783, 785, this Court said: 'Nor is it to be forgotten that retrospective laws are forbidden, eo nomine, by our state constitution; and when this is the case it is immaterial whether or not the act interferes with vested rights. Colley, Const. Lim. (6th Ed.) pp. 454, 455; Black, Const. Law, par. 197, p. 543. . . .'"

However, other Missouri decisions such as State v. Nolte, 165 S.W.2d 632, 638 (Mo. Banc 1942) have held that:

". . . The term retrospective law, however, in the State Constitution has a wider significance and the provision last cited is closely analogous to the obligation of contracts clause of §10, Art. I of the Constitution of the United States. Both of these provisions apply to laws which take away the vested rights of individuals after those rights have been acquired. McManus v. Park, 287 Mo. 109, 229 S.W. 211; Gibson v. Chicago, Great Western R. Co., 225 Mo. 473, 125 S.W. 453; Clark v. Kansas City, St. L. & C. R. Co., 219 Mo. 524, 118 S.W. 40. It is impossible to see how any vested rights were impaired by this Liquidator Act. . . ."

Thus, it appears that, despite the apparent holding in the Graham Paper case, quoted above, a statute is not retrospective in its operation within the terms of the Constitution unless it impairs some vested right. See Annotations, V.A.M.S. "Bill of Rights," Article I, Section 13, pages 595-596.

Viewing the provision in question on its face, it is difficult for us to understand the significance of the date of January 1, 1973, and its apparent exclusion of the operation of ". . . any business of any kind from an office in this state, directly or indirectly, unless the office was in operation on January 1, 1973, or . . .". Therefore, we view such legislation as questionable.

Honorable Keith Barbero

Since this bill is still pending legislation and inasmuch as this office may be required to defend such provisions, if enacted into law, we believe it would be inappropriate for this office to arrive at a general conclusion with respect to the constitutional questions. We assume in the premises that the General Assembly, being knowledgeable of the constitutional limitations placed upon it, will act accordingly.

Yours very truly,

JOHN C. DANFORTH
Attorney General



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

June 26, 1974

OPINION LETTER NO. 171

Honorable Frank Bild
State Senator, District 15
7 Meppen Court
St. Louis, Missouri 63128

Dear Senator Bild:

This letter is to acknowledge receipt of your request for a formal opinion from this office which reads as follows:

"Are persons under Sec. 169.580 RSMo.
1969 employees of the State of Missouri?

"If so, should deductions be made for
the state pension plan, social security, and
withholding tax from the salaries paid under
Sec. 169.580 RSMo. 1969?"

Section 169.580, RSMo 1969, provides as follows:

"Any person who served as a teacher in
the public schools of this state and who re-
tired prior to July 1, 1957, under the provi-
sions of chapter 169, shall upon application
to the state department of education be em-
ployed by the department as a special advisor
and supervisor in connection with state edu-
cational problems. Any person so employed
shall perform such duties as the commissioner
of education directs and shall receive a sal-
ary of seventy-five dollars per month, payable
out of the general revenue of the state pur-
suant to appropriations for the purpose, ex-
cept that the payment to the retired person
for such services, together with the retire-
ment benefits he receives under chapter 169,

Honorable Frank Bild

shall not exceed one hundred fifty dollars per month. The employment provided for by this section shall in no way affect any person's eligibility for retirement benefits under chapter 169."

In connection with the above, the assumption is made that the "state pension plan" that you are referring to is the Missouri State Employees' Retirement System as provided for in Sections 104.310 through 104.450, RSMo, since the employees in question are paid out of general revenue.

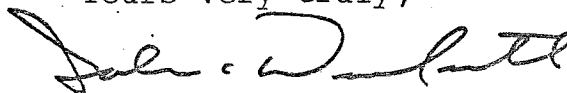
We have communicated with the Department of Education of the state of Missouri, and we are informed that such retired teachers do not actually perform services for the state. Section 104.310 (15), RSMo 1973 Supp., provides in part as follows:

"'Employee', any elective or appointive officer or employee of the state who is employed by a department and earns a salary or wage in a position normally requiring the actual performance by him of duties during not less than one thousand five hundred hours per year, . . ."

In view of the fact that these retired teachers are not earning a salary or wage in a position normally requiring the actual performance of duties during not less than one thousand five hundred hours per year, it is clear that they do not come within the definition of "employee." Therefore, it is clear that the retired teacher is not eligible for membership in the Missouri State Employees' Retirement System.

We are enclosing a copy of a letter dated June 10, 1974, from William J. Wasson, Deputy Commissioner of the Department of Education, giving the reason that the Department of Education is not at the present time withholding federal income tax from the payments for these retired teachers. We are also enclosing a copy of the determination made by C. D. Johnson of the Kansas City Payment Center under date of November 3, 1966, which holds that teachers are not employees of the Missouri State Department of Education and the payments are exempted from wages under the Social Security Act.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosures



OFFICES OF THE

JOHN C. DANFORTH
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

April 5, 1974

OPINION LETTER NO. 172

Harold P. Robb, M.D., Director
Division of Mental Health
Post Office Box 687
Jefferson City, Missouri 65101

Dear Dr. Robb:

This letter is in response to your question asking:

"I respectfully request your opinion whether the Division of Mental Health or one of its facilities must obtain a license under Section 329.045 V.A.M.S. to offer beauty care services to its patients domiciled in that state facility; and secondly, if the operator is duly licensed under Chapter 329 RSMo, must the operator in the event the beauty shop within the facility is not licensed, then 'work from an established beauty salon'?"

Section 329.045, RSMo, to which you refer requires annual registration of shops or establishments in which the occupation of hairdresser, cosmetologist, or manicurist is practiced. There is no indication whatsoever that the legislature intended that such provisions would require the licensing of state mental health facilities. Governmental units are not within the purview of a statute unless an intention to include them is clearly manifest. City of Poplar Bluff v. Knox, 410 S.W.2d 100, 103 (Mo.App. 1966). Therefore such facilities are not within the registration requirements of Section 329.045.

By the use of the word "operator" in your second question, we understand that you mean the division employee classified under

Harold P. Robb, M.D.

the merit system as a beautician and licensed under Chapter 329, RSMo. Such an employee need not "work from an established beauty salon". The beautician so employed may work in the facility as may be required by the needs of the patients and as directed by the head of the facility.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a prominent initial "J" and a long, sweeping underline.

JOHN C. DANFORTH
Attorney General



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

April 11, 1974

OPINION LETTER NO. 173

Mr. Charles L. Arnold, Sr.
Secretary, State Board of
Embalmers & Funeral Directors
West White Street
Canton, Missouri 63435

Dear Mr. Arnold:

This letter is in response to your request for this office's opinion and ruling on the following:

"Is it within the jurisdiction of this office to make an inquiry or to undertake an investigation in an attempt to determine if any individual or organization is in compliance with Sections 436.020, 436.030, 436.040, 436.050, or 436.060 RSMo.?"

You state that several complaints have been received by your office from funeral establishments which are servicing pre-need contracts that some companies are failing to pay sums owing on contracts. You ask whether some agency has the power to determine whether the moneys being paid by the purchasers of pre-need contracts have been deposited according to law.

Chapter 436, RSMo 1969, provides that any agreement, requiring the payment of money to an individual who, in consideration therefor, agrees to provide for the final disposition of a dead body or for funeral or burial services to be rendered which is not immediately required, is declared to be void unless the money paid in installments thereunder is handled in accordance with the chapter's provisions. Generally, Chapter 436 requires that the funds collected are to be deposited in a trust account in order to assure that the funds which the purchaser has been paying will be available upon his death to pay for the funeral.

Mr. Charles L. Arnold, Sr.

The chapter specifically provides certain remedies for its violation. Section 436.070, RSMo, states that a violation by the seller of the act is a misdemeanor and is subject to either or both a fine and imprisonment. Section 436.080, RSMo 1969, states that in addition to any other remedies the state of Missouri may maintain an injunction suit to enjoin violations of the chapter. It is clear then that, in addition to any private right of action which an individual purchaser might have to seek to declare a contract void if the money has not been held in trust as is required, the legislature has specifically provided two remedies.

There is no provision in Chapter 436, RSMo 1969, which purports to confer authority or jurisdiction on the State Board of Embalmers and Funeral Directors to enforce its provisions. If there is any authority vested in the State Board of Embalmers and Funeral Directors to investigate for violations of Chapter 436, it must come from the statute creating that agency. First, it is to be noted that the seller of such a pre-need burial contract does not have to be a licensed embalmer and funeral director. Section 436.010, RSMo 1969, reads in pertinent part:

" . . . The negotiation and administration of such agreements, contracts or plans shall be governed exclusively by the provisions of sections 436.010 to 436.080, and shall not be subject to the laws pertaining to insurance, embalmers or funeral directors." (Emphasis added)

Chapter 333, RSMo 1969, establishing the State Board of Embalmers and Funeral Directors, limits the jurisdiction of that agency to those individuals and establishments which are licensed by it. Generally, we do not believe that the State Board of Embalmers and Funeral Directors or its secretary then has the authority to investigate the business activities of individuals or establishments who are not licensed by it.¹

¹Section 333.261, RSMo 1969, provides that it is a misdemeanor for any person to violate the provisions of Chapter 333. Section 333.241, RSMo 1969, authorizes the Attorney General or the prosecuting attorney to seek to enjoin individuals from engaging in the practice of embalming or funeral directing without first being licensed. We believe that the Board does have the power to conduct an investigation to determine whether unlicensed individuals are violating the provisions of Chapter 333 in order that the information may be referred to the proper authority.

Mr. Charles L. Arnold, Sr.

The second question then is whether the secretary of the Board or the Board of Embalmers and Funeral Directors has the powers to investigate alleged violations of Chapter 436 by its licensees. The selling of pre-need burial contracts is closely related to that of being an embalmer and/or funeral director. We note that many licensed embalmers and funeral directors also undertake to sell pre-arranged funeral contracts as part of their business activities. A threshold inquiry then is to determine whether a violation of Chapter 436 by a licensed embalmer and/or funeral director would be sufficient grounds for the Board of Embalmers and Funeral Directors to initiate disciplinary proceedings to suspend or revoke his license.

Section 333.121, RSMo 1969, provides in part as follows:

"The board may refuse to issue or may suspend or revoke any license of a funeral director or embalmer or may place the holder thereof on a term of probation after proper hearing upon finding the holder of the license to be guilty of any following acts or omissions:

* * *

(3) Willful violation of any professional trust or confidence;

* * *

(13) Unprofessional conduct which means:

(a) Misrepresentation or fraud in the conduct of the business or profession of embalming or funeral directing;"

If an individual is required to place money received in the course of one's business in trust and one does not do so, we believe that individual would be guilty of fraud in the conduct of his business. Since the activity of selling or arranging pre-need funeral arrangements is so closely interrelated with the business of embalming or funeral directing, it is the opinion of this office that a licensed embalmer and/or funeral director who violates Chapter 436 is subject to having his license suspended or revoked.

Section 333.201(1), RSMo 1969, provides:

Mr. Charles L. Arnold, Sr.

"The secretary of the board shall have complete supervision over the field of inspection and enforcement of the provisions of this chapter and shall be responsible to the board."

Clearly, the secretary of the Board of Embalmers and Funeral Directors has the power to make an investigation on behalf of the Board into the business activities of licensed embalmers and/or funeral directors to determine whether a formal complaint should be filed with the Administrative Hearing Commission pursuant to Section 161.272, RSMo 1969, in an attempt to suspend or revoke an individual's license for violating Chapter 436 and Section 333.121(3), (13)(a). We also believe that once the Board makes a decision to initiate proceedings with the Administrative Hearing Commission against a licensee, the secretary of the Board also has authority to conduct an investigation in order to help prepare a prima facie case.

In summary, it is the view of this office that neither the secretary of the Board nor the Board of Embalmers and Funeral Directors has the authority to investigate or to determine whether individuals who are not licensed by it are complying with the provisions of Chapter 436. We believe that the authority of the secretary and the Board of Embalmers and Funeral Directors to investigate for violations of Chapter 436 is limited to only those cases where the Board needs to determine whether a licensee who is selling pre-need funeral contracts as part of his business is complying with the provisions of Chapter 436.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

COMPENSATION: Members of the county board of
COUNTY OFFICERS: equalization established pur-
COUNTY BOARD OF EQUALIZATION: suant to Sections 138.010 and
138.020, RSMo, are entitled to
statutory per diem unless they receive only salary as compensa-
tion for the office which they hold.

OPINION NO. 174

April 11, 1974

Honorable John D. Ashcroft
State Auditor of Missouri
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Ashcroft:

This opinion is in response to your question asking:

"Section 138.020 RSMo 1969, provides:
'The judge of the County court, the county
surveyor, the members as may otherwise be
provided, shall receive five dollars per
day for each day they shall be present and
act in the performance of their duties as
members of the County Board of Equalization;
provided, that the above county officers
who are now or may hereafter be compensated
by salary shall not be entitled to the com-
pensation provided in this section.'

"The question is, what does salary mean for
purposes of the above section and accordingly
which officers are entitled to the per diem
allowance provided within this section?"

Section 138.010, RSMo, provides:

"1. In every county in this state, ex-
cept as otherwise provided by law, there
shall be a county board of equalization con-
sisting of the judges of the county court,
the county assessor, the county surveyor,
and the county clerk who shall be secretary
of the board without vote; except in any
county having township organization, the

Honorable John D. Ashcroft

township assessor shall sit as a member of the board of equalization when the assessment of his township is under consideration or review.

"2. This board shall meet at the office of the county clerk on the second Monday in July, 1946, and on the second Monday of July of each year thereafter."

Section 138.020, RSMo, provides:

"The judges of the county court, the county surveyor, the county assessor, the county clerk, and those sitting as members as may otherwise be provided, shall receive five dollars per day for each day they shall be present and act in the performance of their duties as members of the county board of equalization; provided, that the above county officers who are now or may hereafter be compensated by salary shall not be entitled to the compensation provided in this section."

We will not attempt to cover in detail all the statutes relating to such officers and the various counties relative to such officers' compensation. If it is believed that there are particular problems with respect to any particular officer and his mode of compensation under the statutes relative to your question, such officer should request particular advice on the question through the office of his prosecuting attorney.

In general, most of the county court judges are on an annual compensation basis. See Chapter 49, RSMo. County surveyors are generally paid on a fee basis. See Chapter 46, RSMo. County assessors are paid on an annual salary basis. See Chapter 53, RSMo. County Clerks are paid on an annual compensation basis. See Chapter 51, RSMo. Township assessors are paid by fees. See Chapter 65, RSMo. The above is a general statement, however, and should be considered in light of our previous holdings that where the legislature provides that such officers are paid by fees or by fees and salary and not by salary alone, the officer is entitled to the per diem as a member of the board of equalization.

We held in our Opinion No. 37 dated August 13, 1946, to Harned, that where the officer receives fees as well as salary he is not "compensated by salary" within the meaning of Section 138.020 and is, therefore, entitled to the per diem.

Honorable John D. Ashcroft

We previously held in Opinion No. 4 dated October 17, 1952, to Baker, that county judges who received compensation on the basis of their attendance as members of the county court are entitled to pay for their services as members of the county board of equalization even though both services are rendered on the same day. We believe the same logic follows with respect to other officers who receive compensation not consisting solely of salary. Officers who receive only salaries are not entitled to the per diem allowance provided in Section 138.020.

In our view the terminology "compensated by salary" as used in Section 138.020 means compensated only by a set or fixed sum for the performance of the duties of the office which they hold.

With respect to city members of such board whose membership is authorized by Section 138.015, RSMo, we enclose our Opinion No. 88 dated June 2, 1966, to Conley, which holds that such city members are entitled to the per diem provided for in Section 138.020, RSMo.

CONCLUSION

It is the opinion of this office that members of the county board of equalization established pursuant to Sections 138.010 and 138.020, RSMo, are entitled to statutory per diem unless they receive only salary as compensation for the office which they hold.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 88
6-2-66, Conley



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

May 10, 1974

JOHN C. DANFORTH
ATTORNEY GENERAL

OPINION LETTER NO. 176

Honorable Jerold L. Drake
Representative, District 5
Post Office Box 400
Grant City, Missouri 64456

Dear Representative Drake:

This letter is in response to your request for a ruling on the following question:

"May a housing authority of a city (organized and operating pursuant to Sections 99.010 through 99.230) enter into a contract with the owners of an apartment complex located in the same city and by the terms of which the housing authority will manage for a fee the apartment complex for the owners thereof, the occupants of the apartment complex not being subject to the same admissions policies and rules and regulations as the occupants of the project owned and operated by the Housing Authority, with the proceeds of the management contract to be used in the furtherance of the purposes of the Housing Authority?"

The facts, as they appear in your opinion request, indicate that a group of private individuals constructed an apartment complex pursuant to the National Housing Act, Section 221(d)(3).¹

¹The act is designed to assist private industry in providing housing for low and moderate income families and displaced families. The section provides below-market interest rate insurance.

Honorable Jerold L. Drake

At the present, said apartment complex is being operated and managed by said group of private individuals. The Housing Authority of the City of Maryville desires to enter into a contract with said group of private individuals. The terms of said contract would provide that the Housing Authority would operate and manage for a fee said apartment complex according to the provisions of the contract. The Housing Authority would neither assume liabilities for any debts or operating expenses of the apartment complex, nor would the admissions and occupancy of the tenants of said apartment complex be subject to the same restrictions as the tenants of the housing complex owned by the Housing Authority. The contractual agreement would be strictly for the purpose of generating income for use by the Housing Authority in its community projects.

The declaration and purpose of Chapter 99, RSMo 1969, are set forth in Section 99.030, RSMo 1969. These statements parallel the dicta recited in McQueen v. Druker, 317 F.Supp. 1122 (D.C. Mass. 1970). In that case the court remarked:

" . . . the general goal of both national and state housing programs is to provide for necessitous persons a decent home and a suitable living environment. This include adequate, safe, and sanitary quarters. But it also implies an atmosphere of stability, security, neighborliness, and social justice." Id. at 1129-1130.

Section 99.080, subsection 1, RSMo 1969, provides, in part:

"1. An authority shall constitute a municipal corporation, exercising public and essential governmental functions, and having all the powers necessary or convenient to carry out and effectuate the purposes and provisions of sections 99.010 to 99.230, including the following powers in addition to others herein granted:"

and mortgages for rental housing enacted in the Housing Act of 1961 (12 U.S.C. §1715L). To qualify as a mortgagor for a Section 221(d) (3) project a group must be within one of the following categories: (1) a public agency or body which is not a local public housing authority; (2) a cooperative, including an investor-sponsor; (3) a limited dividend corporation; (4) a nonprofit organization; or (5) other mortgagor approved by the Secretary of the Department of Housing and Urban Development.

Honorable Jerold L. Drake

This paragraph is followed by a listing of seven subparagraphs expressly enumerating and outlining the powers of a housing authority. The grant of power for a housing authority to contract with private individuals to manage and operate an apartment complex cannot be found in these statutory provisions.

Under Missouri law a municipal corporation possesses only those powers granted in express words, those necessarily or fairly implied in or incident to the powers expressly granted, and those essential to the declared objectives and purposes of the corporation. Fair, reasonable doubt concerning the existence of the power is resolved against the corporation. City of Meadville v. Caselman, 227 S.W.2d 77 (K.C.Mo.App. 1950); City of Bellefontaine Neighbors v. J. J. Kelley Realty and Building Company, 460 S.W.2d 298 (St.L. Ct.App. 1970). Although the management and operation for income of an apartment complex by a housing authority generates benefits which may fulfill the purposes of a housing authority, the management and operation of an apartment complex is not "necessary or convenient" in effectuating the purposes and provisions of Section 99.030, RSMo 1969.

In addition, Section 99.090, RSMo, respecting rentals, states in mandatory language that a housing authority shall:

" . . . fix the rentals for dwelling accommodations at the lowest possible rates consistent with its providing decent, safe and sanitary dwelling accommodations, and that no housing authority shall construct or operate any such project for profit, or as a source of revenue to the city or the county. To this end an authority shall fix the rentals for dwellings in its projects at no higher rates than it shall find to be necessary in order to produce revenues which (together with all other available moneys, revenues, income and receipts of the authority from whatever sources derived) will be sufficient

(1) To pay, as the same become due, the principal and interest on the bonds of the authority;

(2) To meet the cost of, and to provide for, maintaining and operating the projects (including the cost of any insurance) and the administrative expenses of the authority; and

Honorable Jerold L. Drake

(3) To create (during not less than the six years immediately succeeding its issuance of any bonds) a reserve sufficient to meet the largest principal and interest payments which will be due on such bonds in any one year thereafter and to maintain such reserve."

And Section 99.100, RSMo, states in similar obligatory language that a housing authority shall observe the following duties with respect to rentals and tenant selection:

"1. In the operation or management of housing projects an authority shall at all times observe the following duties with respect to rentals and tenant selection:

(1) It may rent or lease the dwelling accommodations therein only to persons of low income and at rentals within the financial reach of such persons of low income;

(2) It may rent or lease to a tenant dwelling accommodations consisting of the number of rooms (but no greater number) which it deems necessary to provide safe and sanitary accommodations to the proposed occupants thereof, without overcrowding; and

(3) It shall not accept any person as a tenant in any housing project if the person or persons who would occupy the dwelling accommodations have an annual net income in excess of five times the annual rental of the quarters to be furnished such person or persons, except that in the case of families with three or more minor dependants, such ratio shall not exceed six to one; in computing the rental for this purpose of selecting tenants, there shall be included in the rental the average annual cost (as determined by the authority) to occupants of heat, water, electricity, gas, cooking range and other necessary services or facilities, whether or not the charge for such services and facilities is in fact included in the rental.

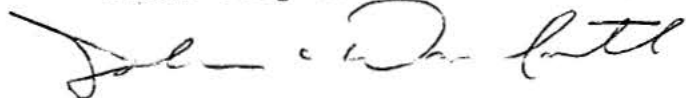
Honorable Jerold L. Drake

"2. Nothing contained in this or section 99.090 shall be construed as limiting the power of an authority to vest in an obligee the right, in the event of a default by the authority, to take possession of a housing project or cause the appointment of a receiver thereof, free from all the restrictions imposed by this or section 99.090."

Thus the role of a housing authority in acting as a manager and operator of an apartment complex would conflict with the real role of autonomy granted to a housing authority in order to exercise its designated duties.

Therefore, it is our view that a housing authority of a city may not enter into a contract with the owners of an apartment complex located in the same city by the terms of which the housing authority is to manage and operate for a fee the apartment complex for the owners pursuant to standards established by the owners.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General



OFFICES OF THE

JOHN C. DANFORTH
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

April 16, 1974

OPINION LETTER NO. 178

Dr. Arthur L. Mallory
Commissioner of Education
Department of Education
Sixth Floor Jefferson Building
Jefferson City, Missouri 65101

Dear Dr. Mallory:

This letter is in response to your question asking:

"Does Section 164.121 authorize a board of education in a six-director district other than a metropolitan or urban district to borrow money and issue bonds in payment thereof for the purpose of building a bus maintenance and storage building providing the proposition is presented to the voters in accordance with provisions of Section 164.121(2) and the proposal receives the required constitutional majority?"

We believe that your question is answered by our enclosed Opinion No. 41, dated August 7, 1951 to Holmes, which held that the limiting language of the statutory predecessor to Section 164.121, RSMo, which also enumerated the purposes for such bond issues, was not controlling because Section 26(b) of Article VI of the Missouri Constitution is self-enforcing and therefore the issuance of school district bonds for the general expenses of the school district is proper.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure

SCHOOLS:
SPECIAL EDUCATION:
RULES & REGULATIONS:
PART-TIME ATTENDANCE:
STATE BOARD OF EDUCATION:

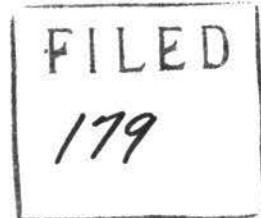
Children may not be excused from the compulsory school attendance requirements of Section 167.031 unless they are "mentally or physically incapacitated," and Section 162.685(5), RSMo Supp. 1973, does not authorize the

State Board of Education to adopt regulations permitting handicapped children to attend a public school special education program for less than a full school day and attend a nonpublic school for the remainder of the day, when the children in question are between the ages of seven and sixteen. However, handicapped children between the ages of seven and sixteen who have been excused from full-time attendance at public school because they are "mentally or physically incapacitated" may attend a nonpublic school for the remainder of the day if they wish. Children who are not between the ages of seven and sixteen may attend a public school special education program for less than a full school day because those children are not subject to the compulsory attendance law. Such children may attend a nonpublic school for the remainder of the day if they wish. State aid shall be paid on a pro rata basis for all special education students attending special education classes part-time regardless of age.

OPINION NO. 179

September 18, 1974

Dr. Arthur L. Mallory, Commissioner
Department of Elementary and
Secondary Education
Post Office Box 480
Jefferson City, Missouri 65101



Dear Dr. Mallory:

This official opinion is in response to your request for rulings on two questions dealing with special education. Your first question asks whether Section 162.685(5), RSMo Supp. 1973, authorizes the State Board of Education to adopt regulations permitting handicapped children to attend a public school education program for less than a full school day and attend a nonpublic school for the remainder of the day. Before analyzing subsection 5, we believe that some general observations are in order.

Section 162.685(5) is part of House Bill No. 474, approved by the 77th General Assembly in 1973. Sections 162.670 et seq., RSMo Supp. 1973. This new law is designed to guarantee handicapped children the same right to a "free and gratuitous education that is afforded to nonhandicapped children." Section 162.670. In order to

Dr. Arthur L. Mallory

implement this equality of treatment, the legislature has expressed its belief that:

"To the maximum extent practicable, handicapped and severely handicapped children shall be educated along with children who do not have handicaps and shall attend regular classes. Impediments to learning and to the normal functioning of such children in the regular school environment shall be overcome whenever practicable by the provision of special aids and services rather than by separate schooling for the handicapped." Section 162.680(2).

Thus, we begin with the intent of the legislature to afford the handicapped child the same rights as a normal child, modified only by the recognition that this child has special needs requiring special services.

House Bill No. 474 contained seventy-two sections establishing a new framework for the education of handicapped children. The legislature recognized, however, that even a statute of this length could not specify all the operational details which will be required to make this program work; the duty to set out those details has been given to the State Board of Education in Section 162.685, which reads in full as follows:

"The state board of education shall adopt after at least one public hearing has been held by the commissioner of education on each subsection of this section and upon his recommendation and, after consulting with recognized authorities in the field:

(1) Standards to be used throughout the state of Missouri in determining whether children shall be defined under sections 162.670 to 162.995 as 'handicapped children' or 'severely handicapped children', together with regulations implementing these standards;

(2) Regulations governing evaluation and reevaluation of handicapped and severely handicapped children prior to and during assignment in a special educational program provided, however, each child assigned to a special educational program shall be fully reevaluated on a regular basis;

Dr. Arthur L. Mallory

(3) Standards for approval of all special education programs established under the provisions of sections 162.670 to 162.995 including, but not limited to, the qualifications of professional personnel employed in such programs and the standards to be used in determining the assignment of each child requiring special educational services to the program which best suits the needs of the child;

(4) Regulations determining the number of enrolled children which constitutes an approved special program including provision for approval by the state board of education of a program of less than the established number if, upon investigation by the state department of education and upon the recommendation of the commissioner of education, it is found a special need exists;

(5) Regulations to be used in determining the eligibility of children in special education programs to attend less than a school day pursuant to section 167.031, RSMo 1969, and in determining the amount of state aid to be paid on a pro rata basis for part-time attendance or programs."

As can be seen by a reading of this section, the State Board is authorized to make regulations concerning nearly every facet of the special education program. Subsection 1 provides for definitional standards so that school administrators will know what type of person is eligible for services under the act. Subsection 2 provides for the establishment of a methodology of evaluation for children who may be eligible for special education programs. Subsection 3 deals with standards for the establishment of programs, including personnel standards. Subsection 4 deals with appropriate class sizes in special education. Subsection 5 deals with the child who may not be able to benefit from a full day's educational program.

The regulations authorized in subsection 5 must be construed in the context of the section to which it refers, Section 167.031, RSMo 1969. This section reads in full as follows:

"Every parent, guardian or other person in this state having charge, control or custody of a child between the ages of seven

Dr. Arthur L. Mallory

and sixteen years shall cause the child to attend regularly some day school, public, private, parochial or parish, not less than the entire school term of the school which the child attends or shall provide the child at home with regular daily instructions during the usual school hours which shall, in the judgment of a court of competent jurisdiction, be at least substantially equivalent to the instruction given children of like age in the day schools in the locality in which the child resides; except that

(1) A child who, to the satisfaction of the superintendent of schools of the district in which he resides, or if there is no superintendent then the chief school officer, is determined to be mentally or physically incapacitated may be excused from attendance at school for the full time required, or any part thereof; or

(2) A child between fourteen and sixteen years of age may be excused from attendance at school for the full time required, or any part thereof, by the superintendent of schools of the district, or if there is none then by the county superintendent of the county in which the child resides, or by a court of competent jurisdiction, when legal employment has been obtained by the child or found to be desirable, and after the parents or guardian of the child have been advised of the pending action."

The legislature, by enacting Section 167.033 as part of House Bill No. 474, reaffirmed that:

"Section 167.031 applies to handicapped children and severely handicapped children, provided that such children receive special educational services as required by sections 162.670 to 162.995. If instruction is provided at home, it must be substantially equivalent to instruction given the children of like development in special educational programs provided under sections 162.670 to 162.995."

Dr. Arthur L. Mallory

Cf. Section 167.041, RSMo 1969, repealed effective July 1, 1974. Thus, all children, handicapped or not, between the ages of seven and sixteen must attend school unless they are exempted by one of the provisions of Section 167.031.

The Supreme Court of Missouri has held, in a case involving special education, that the requirement in Section 167.031 that a child must "attend regularly some day school" forbids a student subject to the compulsory school attendance law from enrolling in more than one school during the school day. Special District for Education and Training of Handicapped Children of St. Louis County v. Wheeler, 408 S.W.2d 60 (Mo. Banc 1966). When the legislature repeated that handicapped children are subject to the compulsory attendance law, therefore, we must conclude that they intended the Wheeler case to continue to be applicable to handicapped children. Had the legislature wanted to allow a new enrollment system such as that which you describe in your question, it would have done so in direct language exempting handicapped children from the "single school" rule of Wheeler. We do not believe that the indirect reference to Section 162.685(5) was such a statement of intent, especially when read in the context of the remainder of House Bill No. 474.

With this introduction, the proper interpretation of Section 162.685(5) is clear.

Subsection 1 of Section 167.031 provides that the superintendent may determine certain children to be "mentally or physically incapacitated," or, in other words, unable to attend or benefit from a full day's attendance at school, and he may excuse those children from all or part of the required school day. In order to insure that this determination is not done in an arbitrary or uninformed manner, however, the legislature provided in Section 162.685(5) that the State Board of Education promulgate standards for use by the superintendents. We believe this to be the sole purpose which can be read into this section.

Once a child has been excused from full-time attendance pursuant to this procedure, what he does with the remainder of his day is of no concern to the public school officials. He may even attend a nonpublic school. What is forbidden by Wheeler is the excusing from the public schools of a child who is not, in the judgment of the superintendent, "mentally or physically incapacitated."

It should be noted that the foregoing discussion of Section 167.031 applies only to children subject to the compulsory school attendance law, i.e., children "between the ages of seven and sixteen years." This office has previously ruled that a student not subject to the compulsory school attendance law has the right to

Dr. Arthur L. Mallory

enroll in a public school on a part-time basis. Opinion No. 73, James, March 14, 1973; Opinion No. 144, James, November 26, 1971; Opinion No. 133, Jasper, October 28, 1971; see also Rabinove, "Does Dual Enrollment Violate the First Amendment," 3 Journal of Law and Education 129 (1974). A student desiring to enroll part-time in the public school would be subject to the same regulations concerning evaluation, diagnosis, and placement that are applicable to all other students receiving special educational services in the public schools.

II.

Your second question asks whether a public school district has the authority to count the attendance of part-time students in making application for state school aid pursuant to Chapter 163, RSMo. Section 162.685(5), quoted above, authorizes regulations "to be used . . . in determining the amount of state aid to be paid on a pro rata basis for part-time attendance." This section clearly contemplates that such part-time aid is authorized by law.

State aid to local school districts is apportioned according to the districts' "average daily attendance,"¹ a phrase defined in Section 163.011, RSMo Supp. 1973, as follows:

"As used in this chapter unless the context requires otherwise:

(1) 'Average daily attendance' means the quotient or the sum of the quotients obtained by dividing the total number of days attended of resident pupils in grades kindergarten through twelve, inclusive, and between the ages of five and twenty in a term, by the actual number of days in that term and not including legal school holidays and legally authorized teachers' meetings;"

¹During the 1973 legislative session, the General Assembly enacted two versions of Section 163.011, each defining the same terms. The language quoted in this opinion appears in House Bill No. 158, which was the second of the two bills to be enacted and, therefore, the one with the force of law. State ex rel. Monier v. Crawford, 262 S.W. 341 (Mo. Banc 1924).

Dr. Arthur L. Mallory

This formula is modified for kindergarten children by Section 163.017, RSMo Supp. 1973, which provides that state aid is paid for these students at one-half the normal rate:

"For the purpose of determining state aid payments under section 163.031 on kindergarten attendance, 'average daily attendance' shall be obtained by dividing one-half the total number of days attended by resident kindergarten pupils whose fifth birthday occurs before the first day of October after the first day of the school term, by the actual number of days that the school was in session not including legal school holidays and legally authorized teachers' meetings."

Section 162.685(5) requires the State Board of Education to approve regulations with regard to state aid for part-time attendance in special education programs paid pursuant to Sections 162.975, 163.031, and any other section providing aid for special education students. By necessary implication, therefore, we must conclude that the payment of state aid for such part-time attendance is authorized. The school districts should report such attendance by whatever method and according to whatever formula is set out in the regulations of the State Board of Education.

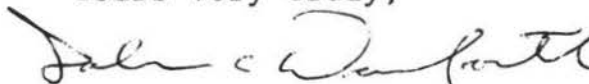
CONCLUSION

Therefore, it is our opinion children may not be excused from the compulsory school attendance requirements of Section 167.031 unless they are "mentally or physically incapacitated," and Section 162.685(5), RSMo Supp. 1973, does not authorize the State Board of Education to adopt regulations permitting handicapped children to attend a public school special education program for less than a full school day and attend a nonpublic school for the remainder of the day, when the children in question are between the ages of seven and sixteen. However, handicapped children between the ages of seven and sixteen who have been excused from full-time attendance at public school because they are "mentally or physically incapacitated" may attend a nonpublic school for the remainder of the day if they wish. Children who are not between the ages of seven and sixteen may attend a public school special education program for less than a full school day because those children are not subject to the compulsory attendance law. Such children may attend a nonpublic school for the remainder of the day if they wish. State aid shall be paid on a pro rata basis for all special education students attending special education classes part-time regardless of age.

Dr. Arthur L. Mallory

The foregoing opinion, which I hereby approve, was prepared by my assistant, Richard E. Vodra.

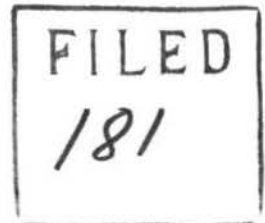
Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a prominent initial "J" and a long, sweeping underline.

JOHN C. DANFORTH
Attorney General

May 28, 1974

OPINION LETTER NO. 181
Answer by letter-Klaffenbach



Honorable John D. Ashcroft
State Auditor of Missouri
State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Ashcroft:

This letter is in response to your question asking whether counties may spend money from general revenue to meet disaster emergency needs when such expenditures have not been budgeted and such expenditures are to be eventually reimbursed through federal grants.

It is our understanding that such federal grants are available to the counties under the Disaster Relief Act of 1970, Public Law 91-606, to aid the counties in making disaster emergency repairs necessitated by floods. The counties were unable to foresee such immense flooding and did not have money budgeted in their emergency funds to meet their immediate needs. We also understand that the counties made application to the federal government for such grants, made such expenditures as were required out of county general revenue (although federal advances were possible), and through the disaster planning offices of the state government, made claims for total reimbursement of such expenditures from the federal government.

The minimum 3% emergency budget fund, which is normally maintained pursuant to Section 50.540, RSMo, is insufficient; and in any event, it would be impossible to budget for such contingencies.

In such a situation where the Governor has declared a disaster, the applicable provisions are found in Chapter 44, RSMo, relating to civil defense.

Honorable John D. Ashcroft

Section 44.010, subsection (1), RSMo, defines "civil defense" as ". . . government at all levels performing emergency functions, other than functions for which military forces are primarily responsible;" and, under subsection (3) "disasters" is defined as ". . . disasters which may result from enemy attack, sabotage, or other hostile action, or from fire, flood, earthquake, or other natural causes;". "Political subdivision" under subsection (6) of such section includes "any county."

Subsection 2 of Section 44.080, RSMo, provides:

"2. In carrying out the provisions of this law, each political subdivision may:

(1) Appropriate and expend funds, make contracts, obtain and distribute equipment, materials, and supplies for civil defense purposes, provide for the health and safety of persons, including emergency assistance to victims of any enemy attack; the safety of property, and direct and coordinate the development of disaster plans and programs in accordance with the policies and plans of the federal and state disaster and emergency planning;"

We conclude that under such provision the counties may make disaster expenditures out of their general revenue even though such expenditures have not been budgeted and that the counties do not thereby violate the law in making unbudgeted disaster expenditures under such circumstances.

Yours very truly,

JOHN C. DANFORTH
Attorney General

FUEL ALLOCATION BOARD: Section 414.150, RSMo, which makes it unlawful for any person to offer fuel products for sale in any manner so as to tend to deceive the purchaser as to the nature, quality, and identity of the product or under any name except the true trade name is not applicable to fuel allocations made by the Missouri Fuel Allocation Board.

OPINION NO. 184

April 11, 1974

Mr. James F. Mauze, Chairman
State of Missouri Fuel Allocation Board
Post Office Box 360
Jefferson City, Missouri 65101



Dear Mr. Mauze:

This opinion is in response to your request for an opinion of this office asking whether the provisions of Section 414.150, RSMo, are applicable to allocations of fuel by the Missouri Fuel Allocation Board as prescribed by the Federal Mandatory Petroleum Allocation Program and whether the Fuel Allocation Board is violating a state statute when ordering emergency delivery of a product from one supplier to be delivered to an outlet of another supplier for sale to the public.

It is our understanding that the Missouri Fuel Allocation Board was created to meet the requirements of the Emergency Petroleum Allocation Act of 1973, P.L. 93-159 and related acts and rules and regulations promulgated pursuant to such laws by the Federal Energy Office. The Federal Energy Office Rules and Regulations respecting petroleum allocation and price regulations are found in Federal Register, Vol. 39, No. 10, dated January 15, 1974, and the authority for such rules and regulations is set forth on page 1925 thereof.

Subsection 1 of Section 414.150, RSMo, to which you refer, provides:

"It shall be unlawful for any person, firm or corporation to store, sell, expose for sale, or offer for sale, any of the said oils or fluids which this chapter provides for inspection, in any manner whatsoever, so as to deceive or tend to deceive the purchaser as to the nature, quality and identity of the product so sold or offered for

Mr. James F. Mauze

sale, or under any name whatsoever except the true trade name thereof."

To the extent that such state law may be viewed as conflicting with the laws of the United States and the rules and regulations promulgated thereunder, including such authorized allocation functions of the Missouri Fuel Allocation Board, such state law is clearly superseded by the laws of the United States. This is because Article VI of the United States Constitution provides in pertinent part that:

"This constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

In addition, it should be clear that Section 414.150 as such has no application to the Missouri Fuel Allocation Board.

Further, it is our view that persons selling such products allocated by the Board in accordance with the criteria established for such sales cannot be in violation of Section 414.150 because such sales are a necessary part of the federal and state allocation program pursuant to such federal laws.

CONCLUSION

It is the opinion of this office that Section 414.150, RSMo, which makes it unlawful for any person to offer fuel products for sale in any manner so as to tend to deceive the purchaser as to the nature, quality, and identity of the product or under any name except the true trade name is not applicable to fuel allocations made by the Missouri Fuel Allocation Board.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Yours very truly,



JOHN C. DANFORTH
Attorney General



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

May 1, 1974

OPINION LETTER NO. 185

Mr. Bert Shulimson
Director, Missouri State
Division of Welfare
Broadway State Office Building
Jefferson City, Missouri 65101

Dear Mr. Shulimson:

This letter is in response to your question asking whether foster parents who receive children from the Juvenile Court under the provisions of Chapter 211, RSMo are legally responsible for the torts committed by children in their care.

We wish to point out that questions concerning the responsibility of persons having charge of children are complex questions which are dependent on the facts of each case. Such questions cannot be answered in general because of the myriad factual situations that may exist.

The general rules respecting the liability of natural parents as expressed in 59 Am.Jur.2d, Parent and Child, §130, which appear to be applicable to those standing in loco parentis (such as foster parents) are as follows:

"It is universally held at common law that the mere fact of paternity does not make a parent liable for the torts of his minor child. A fortiori is this true in the case of an adult child. The parent is not liable merely because the child lives at home with him, works for him, and is under his care, management, and control. Rather, liability exists, apart from the parent's own negligence, only where the tortious act is done by the child as the servant or agent of the

Mr. Bert Shulimson

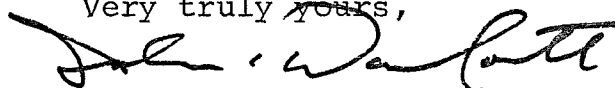
parent, or where the act is consented to or ratified by the parent. The rule that the parent is not liable holds true whether he is present or absent when the tort of the child is committed. However, a parent may be liable for an act of his child if his conduct in the premises was such as to render him a principal tortfeasor, or, in other words, if his own negligence was a proximate cause of the injury complained of. Thus the parents may be liable if their negligence made the injury possible. In a case of this kind, the parent's liability is based upon the ordinary rules of negligence, not upon the relation of parent and child. It is held that the relationship of parent and child is no evidence of a conspiracy to do the tortious act complained of. . . ."

Section 537.045, RSMo, imposes legal liability upon a ". . . parent or guardian of any unemancipated minor, in their care and custody, against whom judgment has been rendered for the willful marking upon, defacing or in any way damaging any property. . . ." in an amount not to exceed three hundred dollars. However, it is our view because of the strict liability and the penal nature of such provisions, such "foster parents" would not be held to be "guardians" within such section.

Your letter also indicates some concern as to whether the Division of Welfare has any liability for the acts of such children. The Division of Welfare as a part of the state government has sovereign immunity. See our Opinions No. 98, dated June 18, 1951, to Witte and No. 25, dated September 5, 1961, to Duval, copies enclosed.

As we noted in Opinion No. 136, dated April 4, 1973, addressed to you, employees of the Division of Welfare including those persons qualifying as "volunteers" are within the provisions of the "Tort Defense Fund", Section 105.710, RSMo Supp. 1973. The question of liability, including the question of whether the defense of sovereign immunity still exists under such section, remains to be determined by the facts of the particular case and cannot be considered in the abstract.

Very truly yours,



JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 98, 6-18-51, Witte
Op. No. 25, 9-5-61, Duval

APPROPRIATIONS:
CONSTITUTIONAL LAW:

Language in an appropriation bill for "personal service" such as Section 16.070, CCSHB No. 1016, passed by the 77th General Assembly, which provides "Any monies accrued due to vacancies or delayed pay increases must be lapsed." is legislating in an appropriation bill and is unconstitutional in violation of Article III, Section 23, Constitution of Missouri. Such language is severable and the appropriated sums for personal service are valid.

OPINION NO. 189

April 25, 1974

Honorable Keith J. Barbero
Representative, District 54
Room 101D, Capitol Building
Jefferson City, Missouri 65101



Honorable Steve Vossmeier
Representative, District 86
Room 414, Capitol Building
Jefferson City, Missouri 65101

Dear Representatives Barbero and Vossmeier:

This is in answer to your request for an official opinion on whether certain language which appears in several sections of appropriation bills now before the legislature is in violation of Article III, Section 23, Constitution of Missouri. The questioned language is as follows:

Any monies accrued due to vacancies or delayed pay increases must be lapsed.

A typical section where this language occurs is Section 16.070 of CCSHB No. 1016, passed by the 77th General Assembly, which section reads as follows:

Section 16.070. To the Office of Administration
Personal Service \$40,000.00
Any monies accrued due to vacancies or delayed
pay increases must be lapsed.

The first problem is to determine just precisely what is intended by this language. Giving the words used their normal meaning so as to give effect to the apparent intention of the legislature, it is apparent that the legislature is attempting to say, as

Honorables Keith J. Barbero and Steve Vossmeier

to vacancies, that if in the course of the fiscal year a person holding a certain job or position should leave for any reason so that such position becomes vacant for some period of time, that such moneys not expended for that position cannot be expended for personal services for that agency, but must lapse. Likewise, as to delayed pay increases, if in the course of the fiscal year any employee is to receive a pay increase to begin on a certain date, but for some reason the pay increase begins at a later date, such sums of money which would have been paid for the pay increase which was delayed cannot be expended for personal services for that agency but must be lapsed. This language, therefore, is obviously an attempt to limit the expenditures in accordance with budget estimates submitted to the legislature, for it is only through the budget estimates that it could be determined what positions exist and at what salaries and pay increases, for the personnel division of the Office of Administration, since no such matters are set by statute.

Accordingly, the question is whether such language amounts to legislation in an appropriation bill which, of course, is prohibited by Article III, Section 3, Constitution of Missouri. See State ex rel. Davis v. Smith, 75 S.W.2d 828, 830 (Mo. 1934); State ex rel. Gaines v. Canada, 113 S.W.2d 783, 790 (Mo. Banc 1937), reversed on other grounds, 305 U.S. 337; and State ex rel. Hueller v. Thompson, 289 S.W. 338, 339, 341 (Mo. Banc 1926).

In the Hueller case the appropriation measure in question read as follows, l.c. 339:

"Sec. 100. Salary--How Determined.--No salary for any official or employee, either elective or appointive, provided for by this appropriation act, shall be in excess of the salary provided by statutory law for such official or employee, and in all cases where the salary of any such official or employee is not definitely fixed by statutory law, no salary paid by virtue of this appropriation act shall be in excess of the salary paid to the officer or employee holding such position the previous biennium." (Emphasis added).

The court held, l.c. 341:

". . . Here we have an appropriation act which not only appropriates money for the various subjects embraced therein, but which attempts to fix and regulate all salaries affected by the act which either have not been fixed by

Honorables Keith J. Barbero and Steve Vossmeier

any statute, or not definitely fixed, which would include all salaries where the maximum alone was named. That the Legislature has the right by general statute to fix salaries is beyond question, but has it the right to do so by means of an appropriation act? We think not."

In our view the principle in this case is applicable here in that the effect of the language used by the legislature is an attempt to fix salaries by position in the personnel division of the Office of Administration by the method of not allowing moneys to be used except in the exact manner presented in the budget estimates.

Also applicable here is Opinion No. 10 dated June 11, 1953, to I. T. Bode in which we held the following language in an appropriation bill to be unconstitutional as legislating in an appropriation bill:

" . . . provided further that no funds shall be expended from this appropriation except in accordance with a budget regularly adopted by the Conservation Commission; for the period beginning July 1, 1953 and ending June 30, 1955."

See also Opinion No. 378 dated July 21, 1971, to Pemberton where we held the Commission of Finance is to set the compensation of employees of the Division of Finance, other than the Commissioner and Deputy Commissioner, at amounts he shall determine notwithstanding the language of an appropriation bill purporting to limit the amount salaries may be increased, and Opinion No. 401 dated August 27, 1971, to Manford holding that similar language in an appropriation bill purporting to limit the amount salaries may be increased was invalid and also language relating appropriations to the budget was invalid.

Accordingly, if there is an appropriation for "personal services" to a state agency such as the Office of Administration, the legislature cannot in the appropriation bill limit the use of a portion of the moneys to any one position or to any specific pay raise for a given period of time. To do so in an appropriation bill is legislating in violation of the constitutional prohibition against legislating in an appropriation bill.

Finally, you ask that if the questioned language is unconstitutional whether the entire appropriated item is void or whether only the specific language is void.

Honorables Keith J. Barbero and Steve Vossmeier

To this question we again quote the Hueller case where the court stated, l.c. 341:

"The question remains, Does the invalidity of said section 100 render the entire Appropriation Act void? We hold that it does not. It is well settled that a legislative act may be void in part, leaving the remainder a good and valid statute, where the part that is valid may be separated from the part that is void.
. . ."

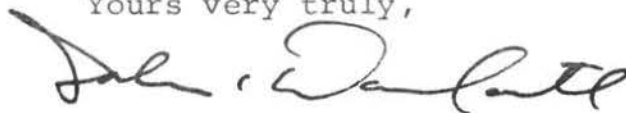
We also again refer you to Opinion No. 10 dated June 11, 1953, to Bode and Opinion No. 378 dated July 21, 1971, to Pemberton, where we held the invalid language severable. Therefore, the appropriated sums for personal service are valid.

CONCLUSION

It is the opinion of this office that language in an appropriation bill for "personal service" such as Section 16.070, CCSHB No. 1016, passed by the 77th General Assembly, which provides "Any monies accrued due to vacancies or delayed pay increases must be lapsed." is legislating in an appropriation bill and is unconstitutional in violation of Article III, Section 23, Constitution of Missouri. It is our further opinion that such language is severable and the appropriated sums for personal service are valid.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 10
6-11-53, Bode

Op. No. 378
7-21-71, Pemberton

Op. No. 401
8-27-71, Manford

APPROPRIATIONS:

CONSTITUTIONAL LAW:

FISCAL AFFAIRS COMMITTEE:

COMMISSIONER OF ADMINISTRATION:

The provision in the Omnibus State Reorganization Act of 1974 (S.B. 1) which purports to give authority to the Committee on State Fiscal Affairs and the Commissioner of Ad-

ministration to "alter" the purpose of appropriations is unconstitutional in violation of Article IV, Section 28 and Article III, Sections 21 through 33, Constitution of Missouri. Similar language in appropriation bills is also unconstitutional in violation of Article III, Section 23, Constitution of Missouri.

OPINION NO. 190

April 25, 1974

Honorable Keith J. Barbero
Representative, District 54
Room 101D, Capitol Building
Jefferson City, Missouri 65101

Honorable Steve Vossmeier
Representative, District 86
Room 414, Capitol Building
Jefferson City, Missouri 65101



Dear Representatives Barbero and Vossmeier:

This is in reply to your request for an official opinion of this office on the following questions:

"1) Can the General Assembly grant to the Committee on State Fiscal Affairs the authority to approve expenditures for purposes other than those given in the appropriation bill?

"2) If the Committee on State Fiscal Affairs does have the authority to approve such expenditures, must all authorized work be done prior to the allowance of new expenditures by the Committee on State Fiscal Affairs?"

You have advised that after every section of Perfected House Committee Substitute for House Bill No. 1009, Seventy-Seventh General Assembly, except Sections 9.157 and 9.160, the following language appears:

Honorables Keith J. Barbero and Steve Vossmeier

"Any balance remaining after completion of listed projects shall lapse unless additional expenditures are authorized by the Committee on State Fiscal Affairs and approved by the Commissioner of Administration."

Your first question therefore was intended to be whether this language is unconstitutional as legislating in an appropriation bill in violation of Article III, Section 23, Constitution of Missouri. It, of course, has been held that it is unconstitutional under Article III, Section 23, to legislate in an appropriation bill. State ex rel. Davis v. Smith, 75 S.W.2d 828, 830 (Mo. 1934); State ex rel. Gaines v. Canada, 113 S.W.2d 783, 790 (Mo.Banc 1937), reversed on other grounds, 305 U.S. 337.

To determine whether the quoted language is general legislation, the language used can be separated into two statements. It is first stated:

"Any balance remaining after completion of listed projects shall lapse . . ."

Giving effect to the ordinary meaning of the language used, this simply says for example in Section 9.020 that if \$50,000 is appropriated to re-equip the present laundry building of the Missouri School for the Deaf, and only \$40,000 is needed and expended for that purpose, that the \$10,000 remaining cannot be spent for any other purpose and must lapse.

Thus, \$10,000 could not be spent on another building of the Missouri School for the Deaf, or to construct a new laundry building for the Missouri School for the Deaf, or for a laundry building or any other building for any other state agency.

By itself, this language is innocuous and amounts to mere surplusage since as a matter of law the \$10,000 cannot be spent for any other purpose than that expressed, that is to re-equip the present laundry building of the Missouri School for the Deaf. Article IV, Section 28, Constitution of Missouri; and see State ex rel. Cason v. Bond, 495 S.W.2d 385 (Mo.Banc 1973).

However, this seemingly innocuous statement of the law is followed by:

". . . unless additional expenditures are authorized by the Committee on State Fiscal Affairs and approved by the Commissioner of Administration."

Honorables Keith J. Barbero and Steve Vossmeier

This language obviously is an attempt by the legislature in this appropriation bill to empower the Committee on State Fiscal Affairs and the Commissioner of Administration to amend the purpose of an appropriation. In other words, the legislature has attempted to delegate to a legislative committee and a member of the executive branch the power to spend appropriated funds contrary to the appropriation purpose.

This clearly would be violative of Article III, Section 23, as legislation in an appropriation bill and accordingly, such language is void.

That is not fully dispositive of the basic question however without determining the intent and validity of a provision of the Omnibus State Reorganization Act of 1974 (S.B. 1) which provides in Section 1.6 (2) as follows:

" . . . The purpose of appropriations made to any department in the executive branch of government shall not be altered without the prior approval of the fiscal affairs committee and the concurrence of the commissioner of administration."

Having determined that the legislature cannot grant in an appropriation bill, the authority to the Committee on State Fiscal Affairs and the Commissioner of Administration to approve expenditures for purposes other than those given in the appropriation bill the question remains whether the legislature, in a general legislative bill can give such authority, and does this language so accomplish this purpose.

Although the language used is not that direct and explicit, so that there is an ambiguity concerning its meaning, the probable interpretation is that it is an attempt to so delegate to the committee and the Office of Administration the power to expend appropriated funds other than for the purpose expressed in any appropriation bill. Or, to state it another way, to delegate the authority to "alter" or "amend" appropriation bills. In purposes of the following discussion, we assume this is the meaning of the language.

Before answering this question as to Senate Bill No. 1, we refer you to Opinion No. 347, Cantrell, June 18, 1971, and Opinion No. 222, Bond, September 4, 1973, in which we held there was no authority of the Committee on State Fiscal Affairs to authorize expenditure of appropriated funds for other than the express purposes stated in the appropriation bills. Those opinions, of course, were issued prior to

Honorables Keith J. Barbero and Steve Vossmeier

the enactment of Senate Bill No. 1 and were based on the analysis that there were no statutes giving the committee this power.

Thus, the question now, is the quoted language valid and binding? We think not.

Article IV, Section 28, Constitution of Missouri, provides:

"No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law, nor shall any obligation for that payment of money be incurred unless the commissioner of administration certifies it for payment and certifies that the expenditure is within the purpose as directed by the general assembly of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it. At the time of issuance each such certification shall be entered on the general accounting books as an encumbrance on the appropriation. No appropriation shall confer authority to incur an obligation after the termination of the fiscal period to which it relates, and every appropriation shall expire six months after the end of the period for which made."

This language could not be more clear that appropriated funds can only be expended for the purposes stated in the appropriation bill itself. We find nothing in this language which permits the legislature to delegate the authority to the committee and the Commissioner of Administration to amend an appropriation act by expending monies other than for the stated purpose.

Furthermore, especially since this provision is self enforcing (see: State ex rel. Baird v. Holladay, 66 Mo. 385 (1877); and State ex rel. Missouri State Board of Agriculture v. Holladay, 64 Mo. 526 (1877)), we think this section prohibits such attempted delegation by the legislature.

What the legislature has thus attempted to do in Senate Bill No. 1 is, as stated above, to allow the committee and the Commissioner of Administration to amend an appropriation bill.

An appropriation bill is of course a law enacted by the General Assembly in virtually the same manner that all laws are enacted.

Honorable Keith J. Barbero and Steve Vossmeier

Article III, Sections 21 through 33, Constitution of Missouri. We have held that the General Assembly has the right to amend an appropriation law. Opinion No. 88, Taylor, January 6, 1959. It is apparent, however, that any law, including an appropriation law, can only be amended by the legislature through the legislative process required by Article III, Sections 21 through 33.

Accordingly, it is also a violation of these provisions for the legislature to, by general legislation, give this legislative function, which only it constitutionally can exercise, to a legislative committee and a member of the executive branch.

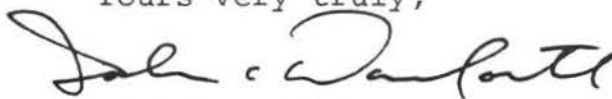
Having answered your first question in the negative, it is unnecessary to answer your second question.

CONCLUSION

It is the opinion of this office that the provision in the Omnibus State Reorganization Act of 1974 (S.B. 1) which purports to give authority to the Committee on State Fiscal Affairs and the Commissioner of Administration to "alter" the purpose of appropriations is unconstitutional in violation of Article IV, Section 28 and Article III, Sections 21 through 33, Constitution of Missouri. It is our further opinion that similar language in appropriation bills is also unconstitutional in violation of Article III, Section 23, Constitution of Missouri.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 347
6-18-71, Cantrell

Op. No. 222
9-4-73, Bond

Op. No. 88
1-6-59, Taylor

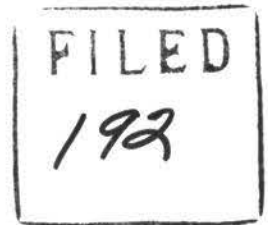
NARCOTICS:
CONTROLLED SUBSTANCES:
CONSTITUTIONAL LAW:
PENAL LAWS:
SCHOOLS:

The proceeds of the sale of any property forfeited to the state pursuant to Section 195.145, RSMo 1969, and sold at public or private sale, should, after payment of the cost of storage, if any, and the cost of the proceedings of the case, be paid into the county school fund.

OPINION NO. 192

April 26, 1974

Honorable A. J. Seier
Prosecuting Attorney
Cape Girardeau County
721 North Sunset
Cape Girardeau, Missouri 63701



Dear Mr. Seier:

This official opinion is issued in response to your request for a ruling involving the construction of Section 195.145, RSMo 1969, and Article IX, Section 7, of the Constitution of Missouri. Your request reads as follows:

"Where a vehicle, vessel, or aircraft shall be declared to be forfeited to the State of Missouri pursuant to Section 195.145, RSMo 1969, and sold at public or private sale, should the proceeds of such sale, after payment of all costs involved, be paid into the general revenue fund of the State of Missouri or into the county school fund?"

Section 195.025, RSMo 1969, prohibits the use of any vessel, vehicle, or aircraft to facilitate the transportation or concealment of any controlled substance. Section 195.145 provides that any vehicle, vessel, or aircraft which has been used or is being used in violation of any provision of Section 195.025 shall be forfeited to the state.

Section 195.145(4), reads in pertinent part:

". . . the court shall order the officer who seized the property to sell the property at public or private sale, subject to the approval of the court and out of the proceeds

Honorable A. J. Seier

of this sale shall be paid the cost of storage, if any, the cost of the proceedings of the case and the balance thereof shall be paid into the general revenue fund of the state of Missouri."

Clearly, then, the intent of this section is that the proceeds of such sales after all costs have been paid, should go into the general revenue fund of the state.

However, Article IX, Section 7 of the Constitution of Missouri reads, in pertinent part:

" . . . All interests accruing from the investment of the county school fund, the clear proceeds of all penalties, forfeitures, and fines collected hereafter for any breach of the penal laws of this state, the net proceeds from the sale of estrays, and all other monies coming into said funds shall be distributed annually to the schools of the several counties according to law."
(Emphasis added).

The Missouri Supreme Court has held that the words "penal laws of the state," as used in Article IX, Section 7 of the Constitution refer to statutory enactments fixing or providing for penalties, forfeitures and fines, and for their assessment and collection. New Franklin School Dist. No. 28, Howard County v. Bates, 225 S.W.2d 769, 774 (Mo. 1950). Since the Narcotic Drug Act, Section 195.010 et seq., RSMo 1969, sets forth penalties for the unlawful possession, transportation and concealment of controlled substances, one of which is the forfeiture and sale of vehicles, vessels, or aircraft which are used in such transportation or concealment, it is clear that the monies derived from such a forfeiture are proceeds collected for breach of the penal laws of this state.

Therefore, it is our opinion that the amount received from the sale of property so seized, after the payment of the cost of storage, if any, and the cost of the proceedings of the case amounts to "clear proceeds" as that term is used in Article IX, Section 7, of the Missouri Constitution and should be placed in the county school fund, notwithstanding the contrary language of Section 195.145(4).

This conclusion is reinforced by opinions of this office construing a similar statute, Section 311.840, RSMo 1969. That section provides that the balance of funds derived from the sale

Honorable A. J. Seier

of contraband liquors forfeited to the state pursuant to Section 311.830, shall, after the payment of storage and costs of the proceedings, be paid into the general revenue fund of the state of Missouri. In Opinion Letter No. 576, issued December 24, 1970, to William P. Wright, this office held that Article IX, Section 7, required that these monies be paid into the county school fund. A similar conclusion had been reached in Opinion No. 10, issued June 24, 1949, to Joseph M. Bone. (Copies of these opinions have been enclosed).

CONCLUSION

It is, therefore, the conclusion of this office that the proceeds of the sale of any property forfeited to the state pursuant to Section 195.145, RSMo 1969, and sold at public or private sale, should, after payment of the cost of storage, if any, and the cost of the proceedings of the case, be paid into the county school fund.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Philip M. Koppe.

Very truly yours,



JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 576
12-24-70, Wright

Op. No. 10
6-24-49, Bone

STATE UNIVERSITIES:
JUNIOR COLLEGES:
SCHOOLS:
COORDINATING BOARD FOR
HIGHER EDUCATION:
CONFLICT OF INTEREST:

The positions of member of the Coordinating Board for Higher Education and board member of a Missouri junior college district or trustee or regent of a state university are incompatible and one person may not hold both positions at the same time.

OPINION NO. 193

July 26, 1974

Honorable Claude R. Blakeley, Jr.
Representative, 139th District
602 West Broadway
Webb City, Missouri 64870



Dear Representative Blakeley:

This official opinion is in response to your request for a ruling on the following question:

"Can a trustee or board member of a Missouri Junior College or State University serve on the new Coordinating Board for Higher Education, serving in both capacities simultaneously?"

The Coordinating Board for Higher Education is created in Section 6 of the Omnibus State Reorganization Act of 1974, Senate Bill 1, 77th General Assembly, First Extraordinary Session (1974). The Board consists of nine members appointed by the Governor with the advice and consent of the Senate, and the Board acts as the head of the Division of Higher Education and has supervisory and review authority over the various public institutions of higher education in this state.

The answer to your question turns on whether membership on the Coordinating Board is incompatible with membership on the governing board of a junior college, college, or university. This office recently issued an opinion holding that the positions of director of a special school district and director of a six-district which is a component part of that special district are incompatible and one person may not hold both positions at the same time. Opinion No. 16, Mallory, March 20, 1974, copy enclosed. In that opinion, we applied the following four-part test in determining incompatibility:

Honorable Claude R. Blakeley, Jr.

"Two offices are intrinsically incompatible at common law when:

- (a) One is subordinate to the other;
- (b) One has supervisory powers over the other;
- (c) One audits the other's accounts; or
- (d) One has power to appointment, or power of removal over the other." Id. at 2-3

In applying this test to the problem you pose, we see that the Coordinating Board has extensive supervisory powers over the various public institutions of higher education in this state. Subsection 2 of Section 6 of the Reorganization Act lists nine specific duties of the Coordinating Board. The first of these is that the Coordinating Board "shall have approval of proposed new degree programs to be offered by the state institutions of higher education;" the third states that "no new state supported senior colleges or residence centers shall be established except as provided by law and with approval of the coordinating board for higher education." Other duties include review of appropriation requests, the establishment of admission guidelines, the establishment of policies and procedures for institutional decisions relating to residence status, the establishment of guidelines to promote and facilitate the transfer of students, and the collection of information and data from the institutions of higher education.

In exercising these duties, the Coordinating Board members will be acting as "super-trustees" with regard to many of the functions of the institutions. If a member of the Board had an institutional commitment to a particular university or junior college because he or she was a member of the institution's governing board, he or she could not review and supervise that institution's performance or goals impartially as a member of the Coordinating Board. Under the test quoted above, membership on the two boards is clearly incompatible.

The legislature has provided the Coordinating Board with an "advisory committee" made up of representatives from eighteen junior colleges, colleges and universities across the state. These advisors have no vote, but their presence will assure that the Coordinating Board has full knowledge of the problems facing the institutions it regulates.

Honorable Claude R. Blakeley, Jr.

CONCLUSION

It is, therefore, the opinion of this office that the positions of member of the Coordinating Board for Higher Education and board member of a Missouri junior college district or trustee or regent of a state university are incompatible and one person may not hold both positions at the same time.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Richard E. Vodra.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", is written over a horizontal line.

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 16
3-20-74, Mallory

May 28, 1974

OPINION LETTER NO. 195
Answer by letter- Wieler



Honorable Phil Snowden
Representative, District 20
6317 North Antioch Road
Gladstone, Missouri 64119

Dear Representative Snowden:

This is in response to your request for an opinion as to the necessity of certain individuals possessing chauffeur's licenses. Specifically, you set forth three examples:

"1. 'A' railroad wants to move a train crew from its yard in Northeast Kansas City to its yard at Ninth Street using a company vehicle and which the driver is a regular driver of the company vehicle. Would this driver be required to have a chauffeur license as set out in Section 302.010 RSMo?

"2. 'B' railroad wants to move a train crew from Chaffee, Missouri to Neeley, Missouri in a company vehicle using a member of the train crew as its driver, who does not regularly drive such vehicle, but is paid to operate the train and not the vehicle, does this driver have to have a chauffeurs license as set out in Section 302.010 RSMo?

"3. A railroad wants to move such train crew as stated in the first and second examples but the Superintendent or Trainmaster is the driver of the company vehicle, would the Superintendent or Trainmaster have to have a chauffeurs license as set out in Section 302.010 RSMo?"

Honorable Phil Snowden

In addition, you have informed us that the movement of train crews takes place on a daily basis and that the movements could be as many as four or five times per hour, or once a day, depending upon the arrival of trains. Also, you have indicated that a crew usually consists of five people and they are moved about in passenger vehicles, trucks, or carryalls.

Section 302.010(1), RSMo 1969, defines "chauffeur" as follows:

"(1) 'Chauffeur', an operator who operates a motor vehicle in the transportation of persons or property, and who receives compensation for such services in wages, salary, commission or fare; or who as owner or employee operates a motor vehicle carrying passengers or property for hire; or who regularly operates a commercial motor vehicle of another person in the course of or as an incident to his employment, but whose principal occupation is not the operating of such motor vehicle;"

In your first example, it is our opinion that an individual who functions as a regular driver of a company vehicle for the purpose of hauling train crews to and from various points is a "chauffeur" within the meaning of the statute. Such a person is clearly operating a motor vehicle in the transportation of persons and, inasmuch as it is part of his regular duties for the company, it cannot be argued that he does not receive compensation in the form of wages for performing these duties.

With respect to your second example, it is our opinion that an individual who drives a company vehicle to move a train crew from one point to another only occasionally or on an infrequent basis and who is paid by the company for operating a train and not driving a crew vehicle, as reflected in his employment contract, is not a "chauffeur" as defined by statute. See Opinion No. 227 issued August 5, 1964, to Bill D. Burlison (copy attached).

However, your statements indicate that the movement of train crews in example No. 2 is on a regular basis. Presumably, the members of such crews take turns in driving through some sort of arrangement among themselves. This being so, it must be argued that such operation takes place on a regular basis. In keeping with the final clause of Section 302.010(1), every member of a train crew who operates a company vehicle for the purpose of moving that crew from one point to another on a regular basis would

Honorable Phil Snowden

need to be licensed as a chauffeur if such vehicle were licensed as a commercial motor vehicle, even though he received no compensation for this service.

The answer to your third question depends upon the extent and nature of the duties of a superintendent or a trainmaster. In response to our questioning, you indicate that the duty of the superintendent or trainmaster is to oversee the entire operation of his assigned territory. This being so, the movement of a train crew by company vehicle from one point to another by the superintendent or trainmaster is part of his regular duties and, presumably, he receives part of his compensation for performing such duties. Accordingly, it is our opinion that such an individual would require a chauffeur's license in order to move train crews from one point to another in a company vehicle.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 227
8-5-64, Burlison



OFFICES OF THE

JOHN C. DANFORTH
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

May 1, 1974

OPINION LETTER NO. 196

Honorable Jack E. Gant
State Senator, 16th District
416 State Capitol Building
Jefferson City, Missouri 65101

Dear Senator Gant:

This opinion letter is in response to your question concerning the effective date of recent amendments to school district boundary change arbitration procedures. You refer to a boundary dispute between the Kansas City and Independence School Districts and suggest that the statutorily provided arbitration procedure may have to be implemented prior to July 1, 1974. You specifically inquire whether the law governing the manner in which arbitrators are chosen is that which appears in the Revised Statutes of Missouri 1969 or whether it is that which is found in House Bill 158, 77th General Assembly (1973), which amends the statutes found in the 1969 revised statutes.

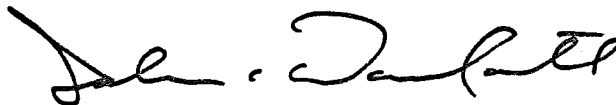
Procedures for the resolution of school district boundary line disputes are set forth in Sections 162.431, 162.681 and 162.691, RSMo 1969. In House Bill 158, the General Assembly repealed those three sections and replaced them with a single new Section 162.431. However, Section A of House Bill 158 states, "This act shall become effective July 1, 1974."

The General Assembly may specify a date in the future on which a statute shall become effective. Section 1.130(2), RSMo 1969; State ex rel. Brunjes v. Bockelman, 240 S.W. 209 (Mo.Banc 1922). Since the General Assembly has exercised this power with regard to House Bill 158, we may not disregard this expression of legislative intention.

Honorable Jack E. Gant

Therefore, it is our opinion that the provisions of House Bill 158 do not become effective until July 1, 1974, and that until that time procedure provided in the Revised Statutes of Missouri 1969, is applicable.

Very truly yours,

A handwritten signature in black ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

JOHN C. DANFORTH
Attorney General

LICENSES: A person whose driver's license has expired can be placed under suspension or
MOTOR VEHICLES: revocation by the Director of Revenue
CRIMINAL LAW: upon the accumulation of the necessary
DIRECTOR OF REVENUE: points; and such a person, or a person
whose license expires subsequent to the issuance of a revocation
or suspension, is subject to prosecution under Section 302.321,
RSMo Supp. 1973, if apprehended while driving during the period
in which the suspension or revocation is in effect.

OPINION NO. 200

May 13, 1974

Mr. James R. Spradling
Director of Revenue
Department of Revenue
Room 401, Jefferson State Office Building
Jefferson City, Missouri 65101



Dear Mr. Spradling:

This official opinion is issued in response to your question as to what action should be taken by the Director of Revenue against a person who has accumulated a sufficient number of points through traffic convictions to require a suspension or revocation of his driver's license, but whose license has expired prior to the time suspension or revocation can be ordered. Also, you have raised the question as to the violation committed by a person who is arrested for driving while under revocation or suspension but whose license has expired subsequent to the suspension or revocation but prior to the arrest.

In Opinion No. 332 issued September 18, 1969, to the Honorable Urban C. Bergbauer, Jr., we discussed these questions and reached the conclusion that a person whose driver's license has expired is not a person whose license can be revoked, and further, that such a person would not be subject to prosecution for driving while under revocation or suspension under the provisions of Section 302.321, RSMo 1969, but rather would have to be prosecuted under Sections 302.020 and 302.340, RSMo 1969, for driving without a valid operator's license.

However, significant changes in the driver's license law subsequent to the issuance of Opinion No. 332, 1969, have caused us to withdraw such opinion. Subsection 2 of Section 302.304, RSMo Supp. 1973, now requires the Director of Revenue to suspend the driver's license and driving privileges of any person whose driving record shows he has obtained or accumulated eight points in

Mr. James R. Spradling

eighteen months. Subsection 3 of that statute requires the Director of Revenue to revoke the driver's license and driving privileges of any person whose driving record shows that he has obtained or accumulated twelve points in twelve months or eighteen points in twenty-four months or twenty-four points in thirty-six months. Section 302.321, RSMo Supp. 1973, has been changed to provide for misdemeanor penalties for anyone convicted of driving during the period of time that his license and driving privilege has been suspended or revoked.

The addition of the phrase "and driving privileges" in the above statutes has created a significant change in the driver's license law. It is no longer necessary that a valid driver's license be outstanding prior to the issuance of a revocation or suspension notice by the Director of Revenue to a person whose driving record shows the accumulation of sufficient points. The Director is now authorized to suspend or revoke the driving privileges in addition to the driver's license. Further, such a person, or a person whose license expires subsequent to the date of suspension or revocation by the Director of Revenue, can be prosecuted under Section 302.321 if apprehended while driving.

CONCLUSION

It is the opinion of this office that a person whose driver's license has expired can be placed under suspension or revocation by the Director of Revenue upon the accumulation of the necessary points; and such a person, or a person whose license expires subsequent to the issuance of a revocation or suspension, is subject to prosecution under Section 302.321, RSMo Supp. 1973, if apprehended while driving during the period in which the suspension or revocation is in effect.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Richard L. Wieler.

Yours very truly,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH
Attorney General



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

May 10, 1974

JOHN C. DANFORTH
ATTORNEY GENERAL

OPINION LETTER NO. 201

Honorable Michael L. Shortridge
Prosecuting Attorney
Texas County, Courthouse
Houston, Missouri 65483

Dear Mr. Shortridge:

This is in response to your recent opinion request regarding an interpretation of Section 229.150, RSMo. Your questions are as follows:

- "a) Whether a person may be prosecuted under Section 229.150 RSMo 1969 with a fact situation as stated in No. 4, infra?
- b) Whether the Township Road Board may seek a permanent injunction in a fact situation as stated in No. 4, infra?
- c) If the answer to 3(a) and 3(b) is in the negative, what, if anything, may be done to resolve this dilemma?"

You state that a landowner has constructed a levee on his property and that an adjacent township maintained road and adjacent land owned by other persons are inundated when there is a heavy rainfall.

Section 229.150, RSMo 1969, provides as follows:

1. All driveways or crossings over ditches connecting highways with the private property shall be made under the supervision of the overseer or commissioners of the road districts.

Honorable Michael L. Shortridge

"2. Any person or persons who shall willfully or knowingly obstruct or damage any public road by obstructing the side or cross drainage or ditches thereof, or by turning water upon such road or right-of-way, or by throwing or depositing brush, trees, stumps, logs, or any refuse or debris whatsoever, in said road, or on the sides or in the ditches thereof, or by fencing across or upon the right-of-way of the same, or by planting any hedge or erecting any advertising sign within the lines established for such road, or by changing the location thereof, or shall obstruct said road, highway or drains in any other manner whatsoever, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than five dollars nor more than two hundred dollars, or by imprisonment in the county jail for not exceeding six months, or by both such fine and imprisonment.

"3. The road overseer of any district, or county highway engineer, who finds any road obstructed as above specified, shall notify the person violating the provisions of this section, verbally or in writing, to remove such obstruction. Within ten days after being notified, he shall pay the sum of five dollars for each and every day after the tenth day if such obstruction is maintained or permitted to remain; such fine to be recovered by suit brought by the road overseer, in the name of the road district, in any court of competent jurisdiction."

From the facts you have given us, it is our view that the holding of the Missouri Court of Appeals, Kansas City District, in Camden Special Road Dist. of Ray County v. Taylor, 495 S.W.2d 93 (1973), is applicable.

In the Camden case the court held that a landowner may ward off surface water, even though in doing so he damages his neighbor under the "common enemy doctrine" and that the doctrine applies solely to surface water in its natural diffused state and not to water which has been artificially collected and accelerated in volume. It is our understanding that the surface water about which you inquire is not unnecessarily collected or discharged.

Honorable Michael L. Shortridge

The court held that Section 229.150 did not abrogate this "common enemy doctrine" and that such a landowner was not in violation of such statute.

Under the Camden ruling there appears to be no legal action available to the township against the landowner for inundating the road in such a manner.

As regards the rights of adjacent landowners, we believe that we cannot rule on their rights because the question of whether or not such private persons have a legal remedy must be left to the determination of private counsel.

This letter is based on the precise fact situation set out above and a different fact situation might well compel a different answer.

Very truly yours,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH
Attorney General

BOWLING:
BILLIARDS:
POOL TABLES:
TAXATION (SALES & USE):

Charges for the use of billiard, pool, bowling, and similar amusement or recreational facilities are subject to Missouri state sales tax under Section 144.020, subsection 1(2), RSMo Supp. 1973 (Senate Bill No. 407, 77th General Assembly).

OPINION NO. 202
Reinstated May 24, 1977

May 10, 1974

Mr. James R. Spradling
Director of Revenue
Department of Revenue
Jefferson State Office Building
Jefferson City, Missouri 65101



Dear Mr. Spradling:

This official opinion is issued in response to your request for a ruling on the question of whether the opinion of the Attorney General, No. 68, issued August 21, 1937, to Edwin C. Orr, is still considered accurate and valid. That opinion held that charges paid by persons for the privilege of playing games of billiards, pool, bowling, or similar amusements are not subject to the Missouri sales tax.

Your question turns upon the interpretation of Section 144.020, subsection 1(2), RSMo Supp. 1973 (Senate Bill No. 407, 77th General Assembly). That statute provides as follows:

"1. A tax is hereby levied and imposed upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state. The rate of tax shall be as follows:

* * *

(2) A tax equivalent to three percent of the amount paid for admission and seating accommodations or fees paid to, or in any place of amusement, entertainment or recreation, games and athletic events;"

In addition, Section 144.010, subsection 1(8)(a), RSMo 1969, defines the term "sale at retail" to include:

Mr. James R. Spradling

"(a) Sales of admission tickets, cash admissions, charges and fees to or in places of amusement, entertainment and recreation, games and athletic events;"

Substantially similar provisions were present in Missouri's sales tax statutes at the time this office issued Opinion No. 68 in 1937. However, we believe the logic of that opinion was faulty and it should not be followed:

The 1937 opinion cited the general principle that taxing statutes are to be construed strictly against the taxing authority. However, it has been held that this general rule:

" . . . does not require that language of a taxing statute be ignored and not given a meaning which reasonably accords with 'the apparent intention of the Legislature as expressed in the statute, with a view to promoting the apparent object of the legislative enactment.' . . ." State ex rel. Thompson Stearns-Roger v. Schaffner, 489 S.W.2d 207 (Mo. 1973), at 215.

The 1937 opinion stated that charges for playing the games in question here "were not taxed under the 1% Sales Tax Act of 1935," which was virtually identical to the present statute except that the words "or in" were not included in the predecessors of Section 144.020, subsection 1(2) and Section 144.010, subsection 1(8)(a). The opinion continued by stating that the addition of the words "or in" did not sufficiently change those two provisions to include the charges in question within the scope of the sales tax act.

But the opinion did not explain why the original 1% Sales Tax Act of 1935 did not tax such charges. We believe that its terms were in fact broad enough to make such charges taxable, and a fortiori, that such charges are taxable under the present sales tax law. Section 144.020, subsection 1(2), uses disjunctive language to distinguish "admission and seating accommodations" from "fees" in places of amusement, entertainment or recreation, games and athletic events. The term "fees" indicates a type of charge different from a mere admission or seating charge; it is sufficient to encompass a fee for the use of billiard tables and balls, bowling alleys, and the like for the amusement or recreation of the user. We believe this is the most reasonable interpretation of the legislature's intention in enacting a comprehensive scheme of sales taxation which includes a tax on "fees paid to or in" places of amusement,

Mr. James R. Spradling

entertainment, or recreation. We can see no indication in the statute that the legislature intended to exclude charges for playing billiards, pool, or bowling from the scope of the sales tax law. Opinion No. 68, rendered August 21, 1937, to Edwin C. Orr, is hereby withdrawn.

CONCLUSION

Therefore, it is the opinion of this office that charges for the use of billiard, pool, bowling, and similar amusement or recreational facilities are subject to Missouri state sales tax under Section 144.020, subsection 1(2), RSMo Supp. 1973 (Senate Bill No. 407, 77th General Assembly).

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mark D. Mittleman.

Very truly yours,

JOHN C. DANFORTH
Attorney General

May 24, 1977

This opinion issued by Attorney General John C. Danforth, May 10, 1974, was withdrawn November 3, 1975, because of L & R Distributing, Inc., et al v. Missouri Department of Revenue, 529 S.W.2d 375 (Mo. 1975). The opinion is being reinstated due to the decision of the Missouri Supreme Court in the case of Blue Springs Bowl v. James R. Spradling, No. 59523, decided May 10, 1977.



JOHN ASHCROFT
Attorney General



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

May 16, 1974

OPINION LETTER NO. 203

Honorable Robert T. Johnson
Representative, District 44
201 Noleen Lane
Lee's Summit, Missouri 64063

Dear Representative Johnson:

This is in response to your request for our official legal opinion on the following question:

"Is a water supply district eligible for a grant of state funds under House Bills Nos. 657 & 664, First Regular Session, 77th General Assembly (Sections 192.600 through 192.620 RSMo) and the appropriation contained in Section 6.165, House Bill No. 6, First Regular Session, 77th General Assembly for use in construction of a water distribution system when the district has been approved for a grant and a loan of funds for the project from the United States Department of Housing and Urban Development, and when the district may in addition receive a loan from the United States Farmers Home Administration for the benefit of this project. These federal grant and loans will be fixed in amount at the time the district applies for the state funds and they exhaust the sources of federal funding for this project."

We understand that the Missouri Division of Health has interpreted these state laws as precluding use of the state funds thereby authorized and appropriated for any water supply project which has received or can receive granted federal funds.

Honorable Robert T. Johnson

Sections 192.600 through 192.620, V.A.M.S., provide in material part:

"The state of Missouri may make direct grants to aid in the financing of any public water supply district, . . . legally organized in this state . . ."
(Section 192.600)

". . . The grants may be made to supplement funds from loan proceeds or other private or public sources when such grants are not available through any other state or federal agency."
(Section 192.605)

"1. The applicant must first apply with the agency or other financial source which is to furnish the primary financial assistance, and after the amount of that assistance has been determined, an application for a grant hereunder may be made to and processed by the division of health. . . .

"2. No grant shall be finally approved until the applicant furnishes evidence of a commitment from the primary financial source."
(Section 192.615)

House Bill No. 6, First Regular Session, 77th General Assembly, appropriated the funds for this grant program as follows:

"Section 6.165. To the Division of Health
For grants to legally organized public water
supply districts. \$2,000,000

.
From Revenue Sharing Trust Fund . . .
(This appropriation is made with the intent to replace the amount of anticipated federal funds to be received by each qualifying district should the federal funds not be forthcoming. If such federal assistance is received, this appropriation shall lapse.)"

We interpret these laws to intend that the funds to be administered by the Division of Health for the benefit of specific

Honorable Robert T. Johnson

projects of water supply districts should be distributed to those districts which, as the result of executive impoundment, did not receive anticipated federal grants for their projects and that the state grants should replace federal grants withheld in whole or in part from the water district as the result of executive impoundment.

We are led to this construction of the laws by the fact that on January 9, 1973, the Federal Office of Management and Budget directed the Secretary of Agriculture and the Farmers Home Administration to suspend the grant program of the Consolidated Farm and Rural Development Act of 1972, 7 U.S.C.A. § 1921 et seq., specifically § 1926(a)(2) thereof which provided:

"The Secretary is authorized to make grants aggregating not to exceed \$300,000,000 in any fiscal year to such associations to finance specific projects for works for the development, storage, treatment, purification, or distribution of water or the collection, treatment, or disposal of waste in rural areas. The amount of any grant made under the authority of this paragraph shall not exceed 50 per centum of the development cost of the project to serve the area which the association determines can be feasibly served by the facility and to adequately serve the reasonably foreseeable growth needs of the area."

We are also advised that the Secretary of Housing and Urban Development on January 5, 1973, indefinitely suspended the water and sewer grant program under 42 U.S.C.A. § 1492(e).

Although these executive branch impoundments of grant funds may have been of doubtful validity (see, for example, State Highway Commission of Missouri v. Volpe, 479 F.2d 1099 (8th Cir. 1973)), we are not aware that they have as yet been declared invalid. In any event, we believe the impoundments supplied the motive for the enactment of House Bill No. 657 (introduced in the legislature on February 7, 1973) and House Bill No. 664 (introduced on February 8, 1973) and Section 6.165 (added to House Bill No. 6 on June 8, 1973).

House Bill No. 664, as introduced, contained this provision:

". . . State grants may be made to supplement funds from loan proceeds or other private or public sources."

The House Committee Substitute for House Bills Nos. 657 and 664 contained this provision:

Honorable Robert T. Johnson

"2. Grants made under the provisions of this section shall only be made to those public water supply districts, sewer districts, or municipal sewer systems which have been certified for loans or funding out of federal funds by the Farmers Home Administration."

The Senate Committee Substitute for House Substitute for House Committee Substitute for House Bills Nos. 657 and 664 contained this provision:

"Section 3. The Division of Health shall administer this program and transmit grant funds to public water supply districts in accordance with the following criteria:

* * *

(2) The public water supply district must be eligible for a loan from the Farmers Home Administration, a bank, a life insurance company, or other private financial institution.

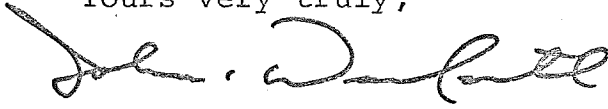
(3) The funds appropriated to carry out this act are supplemental to all other sources. The public water district must have exhausted all other resources and be in need of financial assistance to develop or enlarge the public water supply system."

Viewed in this context, we believe the enacted law, and the statement of purpose accompanying the appropriation measure, represent an intention to replace indefinitely suspended or canceled federal grant programs with this program of state grants to assist in the construction of public water supply systems. We do not believe the law intended to disqualify from the state grant program those public water supply projects which had received federal financial assistance in the form of loans. Rather, we think that the test should be whether there have been at any time federal grants available to the water supply district for its particular project that have been lost in whole or in part as a result of executive impoundment, and if so, then the Division of

Honorable Robert T. Johnson

Health should consider and process the grant request according to the criteria specified in the law and the rules and regulations promulgated thereunder.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

June 5, 1974

OPINION LETTER NO. 205
Answer by Letter - Klaffenbach

Honorable James Millan
Prosecuting Attorney
Pike County, Courthouse
Bowling Green, Missouri 63334



Dear Mr. Millan:

This letter is in response to your question asking:

"Is the Sheriff of Pike County Missouri, which is a third class county entitled to mileage in criminal cases as described in section 57.300 in addition to that mileage that he is entitled to under section 57.430 which also provides for mileage for criminal process, but provides for a maximum of \$200.00 in any one calendar month? In other words, can he receive the \$200.00 under section 57.430 and additional mileage under 57.300 so long as the mileage is not duplicative?"

Section 57.300, RSMo, provides:

"Sheriffs, county marshals or other officers shall be allowed for their services in criminal cases and in all proceedings for contempt or attachment as follows: Fifteen cents for each mile actually traveled in serving any venire summons, writ, subpoena or other order of court when served more than five miles from the place where the court is held; provided, that such mileage

Honorable James Millan

shall not be charged for more than one witness subpoenaed or venire summons or other writ served in the same cause on the same trip."

Section 57.430, RSMo, provides:

"1. In addition to the salary provided in sections 57.390 and 57.400, the county court shall allow the sheriffs and their deputies, payable at the end of each month out of the county treasury, actual and necessary expenses for each mile traveled in serving warrants or any other criminal process not to exceed ten cents per mile, and actual expenses not to exceed ten cents per mile for each mile traveled, the maximum amount allowable to be two hundred dollars during any one calendar month in the performance of their official duties in connection with the investigation of persons accused of or convicted of a criminal offense. When mileage is allowed, it shall be computed from the place where court is usually held, and when court is usually held at one or more places, such mileage shall be computed from the place from which the sheriff or deputy sheriff travels in performing any service. When two or more persons who are summoned, subpoenaed, or served with any process, writ, or notice, in the same action, live in the same general direction, mileage shall be allowed only for summoning, subpoenaing or serving of the most remote.

"2. At the end of each month, the sheriff and each deputy shall file with the county court an accurate and itemized statement, in writing, showing in detail the miles traveled by such officer, the date of each trip, the nature of the business engaged in during each trip, and the places to and from which he has traveled. Such statement shall be signed by the officer making claim for reimbursement, verified by his affidavit, and filed by him with the county court. Whenever claim for reimbursement is made by a deputy, his statement shall also be approved in writing by the

Honorable James Millan

sheriff. The county court shall examine every claim filed for reimbursement, and if found correct, the county shall pay to the officer entitled thereto, the amount found due as mileage."

As we view it the difference in these sections is clear. Section 57.300, RSMo, is not a mileage reimbursement statute, it is a fee statute and such fees are to be charged by the sheriff as are other fees and under Section 57.410, RSMo, are to paid to the county.

On the other hand, Section 57.430, RSMo, provides for allowances payable to the sheriff by the county, in addition to salary, and such allowances are divided into two separate categories. The first category is unlimited in total amount for "actual and necessary expenses for each mile traveled in serving warrants or any other criminal process not to exceed ten cents per mile." The second category is "actual expenses not to exceed ten cents per mile for each mile traveled, the maximum amount allowable to be two hundred dollars during any one calendar month in the performance of their official duties in connection with the investigation of persons accused of or convicted [sic] of a criminal offense." Both categories are subject to the other provisions of such section.

Very truly yours,

JOHN C. DANFORTH
Attorney General

May 20, 1974

OPINION LETTER NO. 206

Answer by letter-Klaffenbach

Honorable Jack E. Gant
Missouri Senate, 16th District
9517 East 29th Street
Independence, Missouri 64055



Dear Senator Gant:

This letter is in response to your question asking:

"May a city official's law partner resume his duties as director and counsel for a bank in which there are city funds deposited in that bank as a result of competitive bidding?"

You also indicate that the official involved is the mayor of the city of Independence, a charter city. However, there is no clear indication in your request respecting the involvement of the law partnership in the activities of the partner who is director and counsel of the bank.

You noted that you have reviewed a number of opinions issued by this office and therefore we will not repeat the substance of such opinions in this letter except as may be necessary. We refer to Opinions 123-1973; 75-1972; 188-1968; 7-1968; and 26-1966.

We note that Section 5.3 of the city charter, with respect to conflicts of interests, contains provisions similar to those contained in the applicable state statutes, however, we do not purport to interpret such city charter provisions as we do not deem this to be our function.

It is also our understanding with respect to such city charter that the council makes the selection of the city depository

Honorable Jack E. Gant

and retains the ultimate powers normally vested in such council with respect to depositories under the law although the day to day administration of city finances is through the city department of finance under charter provision 3.33. Further, we note that the charter provides, Section 2.5, that the mayor presides at meetings of the council and "[a]s a councilman, he shall have all powers, rights, privileges, duties, and responsibilities of a councilman, including the right to vote on questions."

As you know, in our Opinion 123-1973, we held that Section 106.300, RSMo, which prohibits any city officer from being directly or indirectly interested in any contract under the city, or in any work done by the city is applicable to charter cities.

In Opinion 19-1966, copy enclosed, we held that the mayor of a third class city who is president, director and stockholder of a bank in which city funds are deposited violates Section 77.470, RSMo. The provisions of Section 77.470 are similar to those of Section 106.300. Such a conflict would be even clearer in a case such as here where the mayor is by charter, a voting member of the council.

In our Opinion 246-1968, copy enclosed, we held that a member of the city council of a third class city who is an insurance agent violates Section 105.490, RSMo, and Section 106.300, if he furnishes insurance to the city and that such a councilman would also be in violation of such sections if he was a member of the association participating in the division of the agent's commissions.

Further, in our Opinion 44-1970, copy enclosed, we held that a fourth class city fire chief who sells equipment and services to such city through a company owned in whole or in part by him violates Section 106.300. In our Opinion 295-1973, copy enclosed, with respect to Section 12, Article III of the Constitution of Missouri, which prohibits members of the legislature from holding other government employment, we held that the law firm of such legislator, under the opinion of the Advisory Committee of the Missouri Bar, could not render professional services with regard to any matter which a partner, associate or employee could not properly perform. Your particular attention is called to the last full paragraph of that opinion in which we found it unnecessary to determine whether or not the firm is employed in the sense of the constitutional prohibition, in view of such rule, and in the absence of an absolute separation of identity and operation of the persons concerned.

In view of the above and in summary, it appears that unless there is an absolute separation of identities and operation of

Honorable Jack E. Gant

such bank director-counsel and the mayor's law partnership, which separation would be extremely unlikely, there would appear to be both a conflict of interest and a violation of the Missouri Bar Advisory Committee rule noted.

You have not furnished us with precise information however, and since such a determination ultimately involves a factual determination, we do not purport to determine whether there is in fact a conflict.

Very truly yours,

JOHN C. DANFORTH
Attorney General

April 19, 1974

Honorable Robert E. Young
State Representative, District 136
Room 203C, State Capitol Building
Jefferson City, Missouri 65101



Dear Representative Young:

This is in answer to your request this morning for our views as to the limitations, if any, on the power of the General Assembly to appropriate for a governmental unit which has been transferred under the Reorganization Act by a type I transfer. A type I transfer is one described by Section 1.7(1) (a) of Senate Bill No. 1 of the 77th General Assembly, First Extraordinary Session, as follows:

"7.(1) To effect an orderly transition to the departments established by this act, each existing department, division, agency, board, commission, unit or program shall be transferred, as provided, by July 1, 1974.

(a) Under this act a type I transfer is the transfer to the new department or division of all the authority, powers, duties, functions, records, personnel, property, matters pending and all other pertinent vestiges of the existing department, division, agency, board, commission, unit, or program to the director of the designated department or division for assimilation and assignment within the department or division as he shall determine, to provide maximum efficiency, economy of operation and optimum service. All rules, orders and related matter of such transferred operations shall be made under direction of the director of the new department."

It is our view that any limitation or specific provision in any appropriation bill which nullifies or interferes with the

power given to the director of a division or department to carry out his authority under the provisions of Section 1.6(2) and Section 1.7(1)(a) would be invalid as violative of the provisions of Section 23 of Article III of the Constitution of Missouri, providing as follows:

"No bill shall contain more than one subject which shall be clearly expressed in its title, except bills enacted under the third exception in section 37 of this article and general appropriation bills, which may embrace the various subjects and accounts for which moneys are appropriated."

The courts of this state have consistently held that under such provision general legislation cannot be passed in an appropriation act. State ex rel. Davis v. Smith 75 S.W.2d 828, 830 (Mo. 1934); State ex rel. Gaines v. Canada, 113 S.W.2d 783, 790 (Mo. Banc 1938); Attorney General's Opinion No. 378, January 21, 1971, rendered to H. Duane Pemberton. Therefore, if, as to any particular state agency an appropriation has the effect of nullifying the authority granted the director of the reorganized department to assimilate and assign "within the department or division as he shall determine, to provide maximum efficiency, economy of operation and optimum service. . . ." such limitation would be invalid and void under the Constitution. However, an appropriation to a state agency, although restricted to a particular program or function established by law, would not be invalid unless it had the effect of interfering with the director's authority under Section 1.6(2) and Section 1.7(1)(a) to establish the internal organization of the department and allocate and re-allocate duties and functions and to assimilate and assign in such a manner as to promote efficiency and economy of operation.

To answer your question more fully would require detailed study and analysis of each section of the many appropriation bills now pending to determine which sections, if any, constitute legislation in an appropriation act contrary to the provisions of the Constitution. It is impossible for this office to accomplish that analysis today as you have requested. Further, it is the policy of this office not to render an opinion on numerous appropriation items that may be pending at any particular time in the General Assembly.

Very truly yours,

JOHN C. DANFORTH
Attorney General



OFFICES OF THE

JOHN C. DANFORTH
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

May 10, 1974

OPINION LETTER NO. 208

Mr. B. W. Robinson
Assistant Commissioner
Director, Career and Adult Education
Department of Education
Jefferson State Office Building
Jefferson City, Missouri 65101

Dear Mr. Robinson:

This is in answer to your request for our review of the annual revision of the State Plan for Vocational and Technical Education in Missouri, said revision being necessary under the provisions of the Vocational Education Act of 1963, Public Law 88-210, as amended in 1968 by Public Law 90-576 (20 U.S.C. §1241 et seq.).

We note that the new reorganization bill, C.C.S.H.C.S.S.C.S.S.B. No. 1, 77th General Assembly, abolishes the old Department of Education and transfers all powers and duties to the new Department of Elementary and Secondary Education, which is also headed by a State Board of Education and a Commissioner of Education as the chief administrative officer. See C.C.S.H.C.S.S.C.S.S.B. No. 1, 77th General Assembly, Section 5. Subsection 7 of Section 6 of the reorganization act provides that all responsibility for administering the federal-state programs of vocational-technical education, except for the 1202a post-secondary educational amendments of 1972 program, will remain with the Department of Elementary and Secondary Education and the ultimate responsibility for developing the various plans will remain with the State Board of Education.

It is the opinion of this office that the Missouri State Board of Education is the "state board" in this state within the meaning of Section 108(8) of Public Law 90-576. Also, we find that the Missouri State Board of Education has the authority under state

Mr. B. W. Robinson

law to submit a State Plan for Vocational Education and to administer or supervise the administration of same. See Sections 178.420 to 178.580, RSMo 1969. Further, we think that the provisions of this Plan can be carried out by the state; and we note that the Commissioner of Education has been duly authorized by the Missouri State Board of Education to submit the State Plan for Vocational and Technical Education in Missouri and to represent the Missouri State Board of Education in all matters pertaining thereto. See Section 178.540, RSMo 1969.

Therefore, in conjunction with this letter opinion which constitutes our official certification of the application, we have completed the required certification form.

Yours very truly,

JOHN C. DANFORTH
Attorney General



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

May 14, 1974

OPINION LETTER NO. 209

Honorable James C. Kirkpatrick
Secretary of State
State of Missouri
Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Kirkpatrick:

Pursuant to your request we submit the following
ballot title for Senate Joint Resolution No. 15, 77th
General Assembly:

"Provides that persons over age of eigh-
teen registered within time prescribed by
law are entitled to vote at all elections
in which registration is required."

Very truly yours,

A handwritten signature in cursive script, reading "John C. Danforth", is written over a horizontal line.

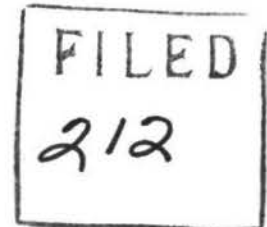
JOHN C. DANFORTH
Attorney General

APPROPRIATIONS: The letters "FTE" used in appropriations for personal services in bills passed by the 77th General Assembly do not affect or restrict the authority of governmental units, to whom appropriations are made, to expend the sums appropriated for "personal services" for the number of employees provided for by general statutes or the number deemed necessary and proper by such governmental unit if the number of employees is not provided for by general statutes.

OPINION NO. 212

May 10, 1974

Honorable Christopher S. Bond
Governor of Missouri
Executive Office
State Capitol Building
Jefferson City, Missouri 65101



Dear Governor Bond:

This is in reply to your request for an opinion of this office asking several questions concerning certain letters which appear in C.C.S.H.B. No. 1004, 77th General Assembly. You state that an example of the use of these letters is found in Section 4.075 where there is an appropriation to the Department of Public Safety for personal service in the office of the director as follows:

"Personal Services (FTE 25) 140,740"

Your first question is what is meant by the letters "FTE."

We have carefully examined C.C.S.H.B. No. 1004, and other appropriation bills, and find no definition or explanation of these letters. Nor are we aware of any use of or definition or explanation of these letters in the Constitution of Missouri or any laws of Missouri. Therefore, it would appear that the letters "FTE" are without legal effect. However, since an appropriation bill is legislation, and the general rule of statutory construction is to determine the intent of the legislature by applying to the words used their ordinary meaning, and since commonly used abbreviations could fulfill this requirement, we have also examined the various dictionaries to determine if the letters "FTE" are generally understood as to their meaning. Again, we find nothing to suggest what "FTE" means. There are, of course, certain words attributed to the individual letters "F," "T," and "E," but there is no commonly understood meaning to these letters individually which in any combination suggest what the legislature had in mind.

Honorable Christopher S. Bond

This does not completely leave the meaning unresolved since you have further informed us that you believe the letters mean "full-time equivalent," and that this phrase appears in the instructions for preparation of personal service details in the budget forms developed by the Office of Administration. That definition is set out as follows:

Full-time Equivalent Computation:

The full-time equivalent number for existing positions as well as project employees will be computed in the following manner. A full-time equivalent employee is one working a full year, less vacation and holidays. For most agencies, a full-time position will be occupied by an employee working 233 days per year at 8 hours per day. An employee (existing positions or project employee) working less than this amount will be designated by showing the appropriate fractional number in the "full-time equivalent" column.

The meaning of "FTE" in C.C.S.H.B. No. 1004 is still, in our opinion, legally unclear, but for purposes of further discussion, we will assume it means "full-time equivalent" as defined above.

Keeping in mind the prohibition against enacting general legislation in an appropriation bill (See Article III, Section 3, Constitution of Missouri, and State ex rel. Davis v. Smith, 75 S.W.2d 828, 830 (Mo. 1934)), the next question is what the legislature intended as to the effect of using "FTE 25" in Section 4.075.

It would appear, in order to give this some meaning (although again we find it difficult to know from "FTE 25"), that the \$140,740 for personal services is to pay the salaries for the equivalent of twenty-five full-time positions. If this is the case, you then ask if it is mandatory that this money only be spent for that number of full-time positions. In other words, does this language restrict the director of the Department of Public Safety to the equivalent of twenty-five full-time employees in the office of the director. If this is the intent, then one result, of course, is that there could not be more than that number of full-time employees. Therefore, the director apparently would not have the authority to pay twenty-five full-time employees less than the total \$140,740 in order to hire extra personnel.

Honorable Christopher S. Bond

On the other hand, it would seem to follow that the director would not have the authority to use the entire \$140,740 for less than the twenty-five full-time positions, and thus, for example, pay twenty employees a higher salary than would be possible if the money was used for twenty-five positions.

If the above is the intent, it would appear in effect that the legislature is attempting to direct that the \$140,740 will be used for exactly twenty-five, or the equivalent, full-time employees. In other words, it would constitute, in an indirect manner, an attempt in an appropriation bill to set the number of employees and their salaries within the various divisions and agencies of the departments. Thus, it would follow that the \$140,740 appropriation for these twenty-five full-time employees must be based precisely upon specific information of the positions and the salaries established those positions. Since, in the case of personal services in the office of the director in the Department of Public Safety, such positions and salaries are not set by statute, the only possible source of such information would be in the budget estimates submitted to the legislature.

First, we do not believe that the legislature so intended to set the number of positions and the salaries in these appropriation bills. This is made plain by the manner in which the legislature made the reference "(FTE 25)." This reference, put in parenthesis, does not suggest a mandatory expression, but rather an explanatory note that the sum is appropriated based on the budget "estimate" of twenty-five full-time positions. We do not interpret this, therefore, as interfering with the usual authority of the department to which money is appropriated to exercise its authority and discretion in determining how the \$140.740 is spent, so long as it is spent for "personal services."

These budget "estimates" are required to be submitted to the legislature by Sections 33.210 through 33.290, RSMo, and Section 1.6(4) (a) and (b) of the "Omnibus State Reorganization Act of 1974."

Such budget estimates do not set salaries by position classification that are in any way binding either on the legislature for appropriations or on the departments to which appropriations are made. Any different conclusion would conflict with the intent and spirit of the "Omnibus State Reorganization Act of 1974" and, of course, the authority of the legislature to appropriate such sums as it deems necessary.

It is obvious that the use of budget forms are to advise the legislature of the estimated funds necessary for the departments so that the legislature can intelligently decide how much money

Honorable Christopher S. Bond

the departments will need in the course of a fiscal year to perform their respective functions. We find nothing, however, to suggest that when appropriations are then made the money must necessarily be spent in the exact manner of the budget forms.

Assuming, however, that the legislature did so intend to set positions and salaries in the appropriation bills, you ask if this is valid. We think not for such would constitute general legislation in an appropriation bill which is prohibited by Article III, Section 3, Constitution of Missouri. See State ex rel. Davis v. Smith, supra; State ex rel. Gaines v. Canada, 113 S.W.2d 783 (Mo. Banc 1937), reversed on other grounds, 305 U.S. 337; and particularly State ex rel. Hueller v. Thompson, 289 S.W. 338 (Mo. Banc 1926) where the court said, l.c. 341:

" . . . Here we have an appropriation act which not only appropriates money for the various subjects embraced therein, but which attempts to fix and regulate all salaries affected by the act which either have not been fixed by any statute, or not definitely fixed, which would include all salaries where the maximum alone was named. That the Legislature has the right by general statute to fix salaries is beyond question, but has it the right to do so by means of an appropriation act? We think not."

This language is equally applicable here where the legislature has attempted to set in the appropriation bills the number of positions as well as salaries. Therefore, we hold that if the designation "(FTE 25)" was meant to be restrictive, this is invalid as legislation in an appropriation bill. We have consistently so held and refer you to Opinion No. 152, 1974, Sikes, and to Opinion No. 189, 1974, Barbero, which discuss this principle, also in the context of attempts to limit executive authority. Opinion No. 189 is especially applicable in that the legislation, in question there, also was an attempt to limit expenditures in accordance with budget estimates.

Finally, we hold that this invalid portion of the appropriation bills is severable. Therefore, the appropriated sums for personal service are valid and can be expended but without restriction as to "(FTE 25)." See again Opinion No. 189, 1974, Barbero.

Honorable Christopher S. Bond

CONCLUSION

It is the opinion of this office that the letters "FTE" used in appropriations for personal services in bills passed by the 77th General Assembly do not affect or restrict the authority of governmental units, to whom appropriations are made, to expend the sums appropriated for "personal services" for the number of employees provided for by general statutes or the number deemed necessary and proper by such governmental unit if the number of employees is not provided for by general statutes.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Yours very truly,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH
Attorney General

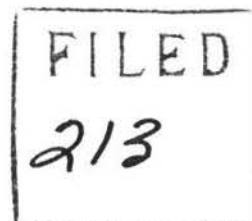
Enclosures: Op. No. 152
3-27-74, Sikes

Op. No. 189
4-25-74, Barbero

APPROPRIATIONS: The term "estimate," found in C.C.S.H.B. No. 1004, 77th General Assembly, and other appropriation bills, is merely informational and has no legal effect.

OPINION NO. 213

May 10, 1974



Honorable Christopher S. Bond
Governor of Missouri
Executive Office
State Capitol Building
Jefferson City, Missouri 65101

Dear Governor Bond:

This is in reply to your request for an opinion of this office concerning the meaning of the word "estimate" as used in various provisions of C.C.S.H.B. No. 1004, 77th General Assembly. You state that an example of this is found in Section 4.015, which is an appropriation to the Governor as follows:

"All grants or contributions from federal or
other sources which may be made available
From Federal and Other Sources
(Estimate \$10,000)"

Then, there is no dollar amount listed in the right-hand column where the specific appropriated amounts are normally placed.

We are unaware of any legal definition of the use of the word "estimate" as used in this manner. We are aware that in the past appropriations of "all grants or contributions" from federal or other sources have been made, without setting a specific appropriated amount. This practice has been characterized as the "open-ended appropriation," the purpose of which is, obviously, to appropriate to the agency involved all such sums received. Therefore, the exact amount of the appropriation is left open.

This does not mean that when the appropriation bill is enacted neither the legislature nor the agency involved has any idea of what the approximate amount of the funds expected to be received will be. Hence, an estimated amount has usually been stated in the budget forms. This year this estimated amount has appeared in the form as quoted above.

Honorable Christopher S. Bond

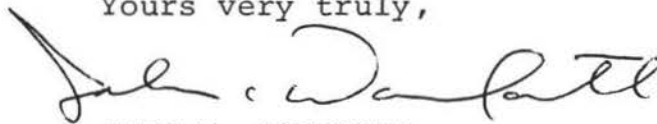
It is our opinion that the legislature intended to reflect this estimated amount, for reference purposes only, and did not intend to limit the amount of the appropriation. For example, if funds in excess of the \$10,000 were to be received pursuant to Section 4.015, such funds would be appropriated and could be expended.

CONCLUSION

Therefore, it is the opinion of this office that the term "estimate," found in C.C.S.H.B. No. 1004, 77th General Assembly, and other appropriation bills, is merely informational and has no legal effect.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

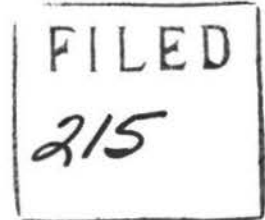
JOHN C. DANFORTH
Attorney General

GOVERNOR: (1) The Mental Health Commission, and
MENTAL HEALTH: not the Governor, has authority to ap-
point the director of the Department
of Mental Health, and (2) the Governor and the Mental Health Com-
mission are each authorized to remove the director of mental health.

OPINION NO. 215

June 12, 1974

Honorable Christopher S. Bond
Governor of Missouri
Executive Offices
State Capitol Building
Jefferson City, Missouri 65101



Dear Governor Bond:

This is in response to your request for an official opinion
to the following questions:

- "1. Does the governor or the mental health
commission appoint the director of the
department of mental health?
- "2. Is the governor, or the mental health
commission, authorized to remove the
director of the department of mental
health?"

Concerning your first question, Article IV, Section 17 of
the Missouri Constitution, as adopted at special election on Au-
gust 4, 1970, states, in part:

" . . . The heads of all the executive depart-
ments shall be appointed by the governor, by
and with the advice and consent of the senate.
. . . ."

Article IV, Section 37(a) adopted at special election on Au-
gust 8, 1972, states, in part:

"The department of mental health shall be in
charge of a director who shall be appointed
by the commission, as provided by law, and by
and with the advice and consent of the senate.
. . . ."

Honorable Christopher S. Bond

Section 9.1 of C.C.S.H.C.S.S.C.S.S.B. No. 1, First Extraordinary Session, 77th General Assembly (hereinafter referred to as Senate Bill No. 1), states, in part:

"There is hereby created a department of mental health to be headed by a mental health commission who shall appoint a director, by and with the advice and consent of the senate.
. . ."

It is apparent that there are conflicting provisions in the Constitution concerning who appoints the Director of the Department of Mental Health. Initially, it should be stated that provisions of the Constitution which appear to conflict are deemed repugnant only when ". . . they relate to the same subject, are adopted for the same purpose, and cannot be enforced without substantial conflict. . . ." 16 C.J.S. Constitutional Law §24 p. 97. These requirements appear to be met in this situation.

The resolution of the question turns on rules of constitutional interpretation. Normally, where there is a specific provision, with a particular intent, that conflicts with a general provision, with a general intent, the specific provision will be treated as an exception, and shall receive a strict but reasonable interpretation. 16 C.J.S. Constitutional Law §25 p. 98. It is apparent that Article IV, Section 37(a) is a specific provision and Article IV, Section 17 is a more general provision.

Furthermore, Article IV, Section 37(a) was adopted more recently than Article IV, Section 17. 16 C.J.S. Constitutional Law §26 p. 99, states, in part:

". . . As the latest expression of the will of the people a clause in a constitutional amendment will prevail over a provision of the constitution or earlier amendment inconsistent therewith, since an amendment to the constitution becomes a part of the fundamental law, and its operation and effect cannot be limited or controlled by previous constitutions or laws that may be in conflict with it. . . ."

This rule has been adopted in Missouri. Moore v. Brown, 165 S.W.2d 657, 663 (Mo. Banc 1942); State ex rel. Board of Fund Commissioners v. Holman, 296 S.W.2d 482, 491 (Mo. Banc 1956); State ex rel. Lashly v. Becker, 235 S.W. 1017, 1020 (Mo. Banc 1921); State ex inf. McKittrick v. Bode, 113 S.W.2d 805 (Mo. Banc 1938).

Honorable Christopher S. Bond

In light of these rules of interpretation, it is our view that the provisions of Article IV, Section 37(a) prevail over Article IV, Section 17.

Attorney General's Opinion No. 161 dated April 4, 1974, to Harold P. Robb, M.D. (copy enclosed) indicated our view that Section 9.1 of Senate Bill No. 1 was unconstitutional to the extent that it attempted to make the commission the head of the department. The opinion also held that such provision is severable. Therefore, it is our view that the provision of Section 9.1, which states that the commission shall appoint a director, is consistent with the Constitution.

Furthermore, Section 1.6(1) of Senate Bill No. 1 states, in part:

"The head of each department shall be appointed, as provided by the Constitution, by the governor with the advice and consent of the senate. . . ."

We believe that this provision may not be applied to the director of the Department of Mental Health for the reason stated above.

Concerning your second question, Article IV, Section 17 states, in part:

". . . All appointive officers may be removed by the governor . . ."

Section 1.6(1) of Senate Bill No. 1 states, in part:

". . . The head of each department shall serve at the pleasure of the governor unless otherwise provided by the Constitution or this act."

Section 9.1 of Senate Bill No. 1 states, in part:

". . . The director shall be the administrative head of the department and shall serve at the pleasure of the commission . . ."

Removal from office has been defined as ". . . a deprivation of office by the act of a competent superior officer acting within the scope of his authority. . . ." 67 C.J.S. Officer §59 pp. 240-241. It is, therefore, necessary to analyze the three above-quoted expressions of "authority."

Honorable Christopher S. Bond

Concerning the Governor's authority to remove appointed officers, it has been the general rule that the power to remove from office is not inherent but must be vested by the Constitution in the executive. 16 C.J.S. Constitutional Law §168 p. 848. This has apparently been accomplished in Article IV, Section 17. The General Assembly has also granted the Governor this authority in Section 1.6(1) of Senate Bill No. 1.

Therefore, it is our view that the Governor is properly authorized to remove the director of mental health.

Concerning the Mental Health Commission's power to remove the director of mental health, the statute is clear that the director "serves at the pleasure" of the commission.

The question arises as to whether this provision of Senate Bill No. 1 conflicts with Article IV, Section 17. We think not. A statutory provision is not repugnant to a constitutional provision unless clearly so (see earlier discussion of "repugnance") and unless the two provisions cannot have concurrent operation. 16 C.J.S. Constitutional Law §43 p. 136.

We believe that the above-quoted provisions of the Constitution and Senate Bill No. 1 can have concurrent operation. Therefore, it is our view that the Governor and the Mental Health Commission are each authorized to remove the director of mental health.

CONCLUSION

It is the opinion of this office that (1) the Mental Health Commission, and not the Governor, has authority to appoint the director of the Department of Mental Health, and (2) the Governor and the Mental Health Commission are each authorized to remove the director of mental health.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Andrew Rothschild.

Yours very truly,



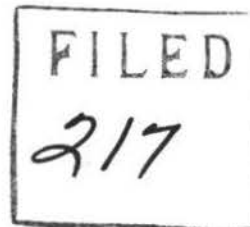
JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 161
4-4-74, Robb

APPROPRIATIONS: The Governor has the authority to establish the level of salary of the director of the Department of Transportation and such funds appropriated to the department, for personal service, may be utilized to supplement the amount appropriated for the salary of the director.

OPINION NO. 217

May 10, 1974



Honorable Christopher S. Bond
Governor of Missouri
Executive Office
State Capitol Building
Jefferson City, Missouri 65101

Dear Governor Bond:

This is in reply to your request for an opinion concerning the validity of an appropriation, in C.C.S.H.B. No. 1004, 77th General Assembly, for the salary of the director of the Department of Transportation.

Section 4.540 of C.C.S.H.B. No. 1004 states, in part:

"To the Department of Transportation
For the Administration and Aviation
Section
Salary of the Director. \$17,500
Personal Service (FTE 7). 81,582"

Section 14.1 of the "Omnibus Reorganization Bill of 1974" (C.C.S.H.C.S.S.C.S.S.B. No. 1, First Extraordinary Session, 77th General Assembly, hereinafter referred to as Senate Bill No. 1) states, in part:

"There is hereby created a department of transportation . . . The governor shall appoint a director of the department by and with the advice and consent of the senate, to be the chief administrative officer of the department and shall fix the level of his salary."

Section 1.6(7) of Senate Bill No. 1 states:

Honorable Christopher S. Bond

"The director of each department, other than those directors appointed by the heads of departments authorized to set salaries of directors, shall receive an annual salary of thirty thousand dollars payable in twelve equal monthly installments."

Generally, the courts of Missouri and this office, in numerous official opinions, have consistently held that any portion of an appropriation bill which, in effect, would constitute general legislation, is in violation of Article III, Section 23 of the Missouri Constitution. See State ex rel. Davis v. Smith, 75 S.W.2d 828 (Mo. Banc 1934); State ex rel. Gaines v. Canada, 113 S.W.2d 783 (Mo. Banc 1937), reversed on other grounds, 305 U.S. 337; and particularly State ex rel. Hueller v. Thompson, 289 S.W. 338 (Mo. Banc 1926).

Therefore, if the General Assembly has, by previous general legislation, granted a power to another or established a particular provision, it may not affect that previous grant or provision by the terms of an appropriation bill. Additionally, valid and invalid portions of an appropriation bill are severable. See Attorney General's Opinion No. 10, dated June 11, 1953, to I. T. Bode.

Initially, there appears to be a possible conflict between the provisions of Section 1.6(7) and Section 14.1 of Senate Bill No. 1. It is our view, considering the traditional rules of statutory interpretation, that a specific expression of the General Assembly will be interpreted as an exception to a more general expression, to the extent they conflict. Thus, we believe the General Assembly intended to grant the authority to the Governor to set the director's salary by the provisions of Section 14.1 of Senate Bill No. 1.

Therefore, the General Assembly cannot affect the previous grants, to the Governor, by attempting to set the salary level of the director in an appropriation bill.

Consequently, it is our view that, if the Governor establishes a salary level in excess of \$17,500, the additional funds (\$81,582) appropriated for personal service to the department may be utilized to pay the difference.

On the other hand, if the Governor establishes a salary level below \$17,500, it is our view that the amount appropriated in excess of the set level must lapse.

Honorable Christopher S. Bond

CONCLUSION

Therefore, it is our opinion that the Governor has the authority to establish the level of salary of the director of the Department of Transportation and such funds appropriated to the department, for personal service, may be utilized to supplement the amount appropriated for the salary of the director.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

May 23, 1974

OPINION LETTER NO. 218

Honorable James C. Kirkpatrick
Secretary of State
State of Missouri
State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Secretary:

In accordance with Section 125.030, RSMo 1969, we have prepared a ballot title for House Joint Resolution No. 68, 77th General Assembly.

The ballot title is:

"Authorizes indebtedness by all municipalities and counties for industrial development upon two-thirds vote; cities may issue revenue bonds with majority approval of voters."

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written over a horizontal line.

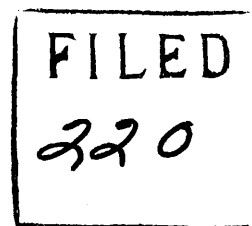
JOHN C. DANFORTH
Attorney General

MERIT SYSTEM: In addition to the Director of
STATE EMPLOYEES: the Department of Social Services
DEPARTMENT OF SOCIAL SERVICES: and his secretary, and the division directors and their secretaries, and three additional positions in each division, all positions included in the exemptions listed in Section 36.030.1, RSMo, are excluded from the requirements of Chapter 36, RSMo.

OPINION NO. 220

June 11, 1974

Honorable Christopher S. Bond
Governor of Missouri
Executive Offices
State Capitol Building
Jefferson City, Missouri 65101



Dear Governor Bond:

This is in response to your question as stated:

"Does the provision of Section 13.1 of Senate Bill No. 1, which allows 'no more than three additional positions in each division' of the Department of Social Services to be nonmerit positions, include the positions exempted by Section 36.030 RSMo?"

Section 13.1 of C.C.S.H.C.S.S.C.S.S.B. No. 1, First Extraordinary Session, 77th General Assembly (hereinafter referred to as Senate Bill No. 1), states in part:

" . . . All employees of the department of social services shall be covered by the provisions of chapter 36, RSMo, except the director of the department and his secretary, all division directors and their secretaries, and no more than three additional positions in each division which may be designated by the division director." (Emphasis added)

Section 36.030.1, RSMo, as amended by House Bill No. 8 (H.C.S. H.B. No. 8), First Extraordinary Session, 77th General Assembly, effective May 2, 1974, states:

Honorable Christopher S. Bond

"A system of personnel administration based on merit principles and designed to secure efficient administration is established for all offices, positions and employees of the division of welfare, the division of health, the division of mental health, the state department of corrections, the personnel division and other divisions and units of the office of administration, the division of employment security of the department of labor and industrial relations, the division of industrial inspection, the tourism commission, the board of probation and parole, the board of training schools, and such other agencies as may be required to maintain personnel standards on a merit basis by federal law or regulations for grant-in-aid programs, except that the following offices and positions of these agencies are not subject to this law and may be filled without regard to its provisions:

(1) Other provisions of the law to the contrary notwithstanding, members of boards and commissions and heads of divisions of service having specified terms of office or required by law to be appointed by the governor or by the director of a department of the executive branch of government, except the personnel director;

(2) One secretary for each board or commission the members of which are appointed by the governor or by a director of a department of the executive branch of government, except the personnel advisory board;

(3) One secretary for each director, division head and each member of boards and commissions the members of which devote their full time to the business of the board or commission and are appointed by the governor or by a director of a department of the executive branch of government, except the personnel director;

Honorable Christopher S. Bond

(4) Chaplains and attorneys regularly employed or appointed in any department or division subject to this law, persons employed in a professional or scientific capacity to make or conduct a temporary and special inquiry, investigation, or examination, and persons whose employment is such that selection by competitive examination is not practicable under all the circumstances;

(5) Physicians employed in agencies or institutions other than in those agencies and institutions within the department of public health and welfare;

(6) Persons whose employment is incidental to the fulfillment of a formal contract entered into in behalf of the state by competent authority when the persons are in fact employees, agents or representatives of the contractor;

(7) Patients or inmates in state charitable, penal and correctional institutions who may also be employees in the institutions;

(8) Persons employed in an internship capacity in a state department or institution as a part of their formal training leading to an academic degree; except that by appropriate resolution of the governing authorities of any department or institution, the personnel division may be called upon to assist in selecting persons to be appointed to internship positions;

(9) Except as otherwise provided by law, a deputy or deputies to the exempt head of each division of service as warranted by the size and complexity of the organization and as approved by the personnel advisory board, and one secretary for each such deputy so exempted; provided, however, that merit status will be retained by present incumbents of those positions which have previously been subject to this law;

Honorable Christopher S. Bond

(10) Notwithstanding the provisions of section 26.300, RSMo, the director of the division of design and construction, the director of the division of contracting and procurement, the director of the division of budget, and the director of the division of accounting in the office of administration."

Section 36.030.1, RSMo, quoted above, provides for several classifications of positions that are generally exempt from the provisions of Chapter 36. The legislature presumably intended that these enumerated positions would be better staffed without application of the Chapter 36 provisions. As such, the exempt positions designated in Section 36.030.1 are to be considered also exempt from the merit system law as applied to the Department of Social Services.

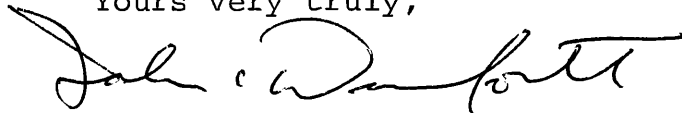
Therefore, it is our view that the exceptions to the provisions of Chapter 36, RSMo, as authorized by Section 13.1 of Senate Bill No. 1 include: (1) the director of the department and his secretary, (2) the division directors and their secretaries, (3) three additional positions in each division of the department as designated by the respective division director, and (4) all exempted positions delineated in Section 36.030.1.

CONCLUSION

It is the opinion of this office that in addition to the Director of the Department of Social Services and his secretary, and the division directors and their secretaries, and three additional positions in each division, all positions included in the exemptions listed in Section 36.030.1, RSMo, are excluded from the requirements of Chapter 36, RSMo.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Andrew Rothschild.

Yours very truly,



JOHN C. DANFORTH
Attorney General

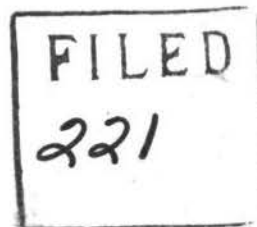
REORGANIZATION ACT:

Under the provisions of Senate Bill No. 1, 77th General Assembly, First Extraordinary Session, where a division is created by statute and an existing agency is transferred to it by "Type I" transfer, the department head has the power that he would if the agency were transferred by "Type I" transfer to the department except he may not abolish the division and he may not assign the function of the previously existing agency to another division in the department.

OPINION NO. 221

June 18, 1974

Honorable Christopher S. Bond
Governor of Missouri
Executive Suite
State Capitol Building
Jefferson City, Missouri 65101



Dear Governor Bond:

This is in response to your question, as stated:

"In several sections of Senate Bill No. 1 (the Omnibus State Reorganization Act) the legislature has created a new division within a department, and has transferred an existing agency, or portion thereof, to this new division by "Type I" transfer. What authority do the relevant department heads have over divisions within departments, created by this fashion?"

Initially, our review of Senate Bill No. 1 (C.C.S.H.C.S.S. C.S.S.B. No. 1, First Extraordinary Session, 77th General Assembly) reveals several sections which expressly create divisions to which your general question is applicable. They are:

1. Sections 4.11 and 4.12 - Division of Commerce and Industrial Development,
2. Sections 8.5 and 8.6 - Division of Industrial Inspection,
3. Sections 9.5, 9.6 and 9.7 - Division of Mental Retardation and Developmental Disabilities,

Honorable Christopher S. Bond

4. Section 11.11 - Division of Water Safety,
5. Section 13.7 - Division of Family Services,
6. Section 13.8 - Division of Veterans Affairs, and
7. Section 13.16 - Division of Youth Services.

In each of the above-listed sections of Senate Bill No. 1, the General Assembly has created a new division within a department and has transferred a former agency to the division by "Type I" transfer. There has not been included in these sections any expression concerning the relationship between the department head and the specific division (except, in most cases, the power to appoint the division head).

Section 1.7 (1) (a) of Senate Bill No. 1 defines a "Type I" transfer as follows:

"(a) Under this act a type I transfer is the transfer to the new department or division of all the authority, powers, duties, functions, records, personnel, property, matters pending and all other pertinent vestiges of the existing department, division, agency, board, commission, unit, or program to the director of the designated department or division for assimilation and assignment within the department or division as he shall determine, to provide maximum efficiency, economy of operation and optimum service. All rules, orders and related matter of such transferred operations shall be made under direction of the director of the new department."

Section 1.6 (2) states, in part:

"(2) Unless otherwise provided by this act, the head of each department is authorized to establish the internal organization of the department and allocate and reallocate duties and functions to promote economic and efficient administration and operation of the department. . . ."

The provisions of Section 1.7 (1) (a) do provide for a "Type I" transfer of an agency to a division. (The prevalent approach

Honorable Christopher S. Bond

in the bill is to transfer an agency by "Type I" to a department). However, the provision states that:

" . . . All rules, orders and related matter of such transferred operations shall be made under direction of the director of the new department."

This section, considered with Section 1.6 (2), shows that the legislature intended that the department head should have the same powers relating to these divisions, created by statute, as he would to a previously existing agency transferred by "Type I" to his department directly. However, we believe the legislature intended that the enumerated divisions be created and that they contain the functions of the previously existing agencies transferred to them. This would be one restriction on the normal exercise of power by a department head in assimilating an agency, or division, by a "Type I" transfer.

Therefore, we believe that while the relevant department head cannot abolish the specified division and may not assign the function of the specified agency to another division in the department he may otherwise consider that division as he would a division transferred to his department by a "Type I" transfer.

CONCLUSION

It is the opinion of this office that under the provisions of Senate Bill No. 1, 77th General Assembly, First Extraordinary Session, where a division is created by statute and an existing agency is transferred to it by "Type I" transfer, the department head has the power that he would if the agency were transferred by "Type I" transfer to the department except he may not abolish the division and he may not assign the function of the previously existing agency to another division in the department.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Andrew Rothschild.

Very truly yours,



JOHN C. DANFORTH
Attorney General



OFFICES OF THE

JOHN C. DANFORTH
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

June 26, 1974

OPINION LETTER NO. 222

Mr. G. L. Donahoe, Executive Secretary
Public School Retirement System
Post Office Box 268
Jefferson City, Missouri 65101

Dear Mr. Donahoe:

This letter is to acknowledge receipt of your request for an opinion from this office in regard to the authority of the Retirement System to promulgate the following regulation:

"2. 'A member of the system who is granted a sabbatical leave by his employer, will receive credit for the time spent on leave when contributions are withheld and remitted in the same manner as for other members rendering service for that employer if:

(a) The sabbatical leave is for the purpose of Study and Professional Improvement.

(b) The sabbatical leave is incorporated in the written terms of the Employment Contract and is in exchange for services actually rendered during the contract period and not a gratuity.

(c) The compensation provided for in the Employment Contract is at least 50% of the amount of the member's previous year's annual salary.

"Instances not covered under (a), (b), or (c) above shall be determined by the Board of Trustees upon the facts of each case."

Mr. G. L. Donahoe

Generally, the Public School Retirement System of Missouri is provided for by Sections 169.010 through 169.130, RSMo 1973 Supp. In this regard, subsection 1 of Section 169.050, RSMo 1969, defines members of the system as follows:

"... all employees as herein defined of districts included in the retirement system thereby created shall be members of the system by virtue of their employment."

Subsection 6 of Section 169.010, RSMo 1973 Supp., defines "employees" as being synonymous with the term "teacher." The word "teacher" is defined in part in subsection 16 of Section 169.010, RSMo 1973 Supp., as follows:

"'Teacher' shall mean any teacher, teacher-secretary, substitute teacher, supervisor, principal, supervising principal, superintendent or assistant superintendent, school nurse, or librarian who shall teach or be employed by any public school, state college or state teachers' college on a full-time basis and who shall be duly certificated under the law governing the certification of teachers; any county superintendent of schools, assistant county superintendent of schools and those employed by county superintendents of schools upon a full-time basis. . . ."

In addition, the word "employer" is defined in part in subsection 7 of Section 169.010, RSMo 1973 Supp, as follows:

"'Employer' shall mean the district that makes payment directly to the teacher or employee for his services;"

Subsection 1 of Section 169.030, RSMo 1973 Supp., provides that contributions shall be made in equal amounts by "members of the system and their employers." Subsection 10 of Section 169.010, RSMo 1973 Supp., defines "membership service" as service rendered by a member of the Retirement System after the system becomes operative. Lastly, the board is granted authority to adopt rules and regulations by subsection 14 of Section 169.020, RSMo 1973 Supp., which provides:

"Subject to the limitations of sections 169.010 to 169.130, the board of trustees shall formulate and adopt rules and regulations for

Mr. G. L. Donahoe

the government of its own proceedings and for the administration of the retirement system."

It should also be noted that Section 168.122, RSMo 1969, relating to leaves of absence by teachers, provides as follows:

"A board of education may establish policies for granting leave of absence including sabbatical leave, maternity leave, sick leave, and military leave. The board of education of a school district may, upon the written request of a teacher, and for good cause shown, grant a leave of absence or place him on a part-time teaching schedule for a period of one year, subject to renewal from year to year. Temporary part-time employment and military service shall not be counted as continuous full-time service in computing tenure but shall not impair the tenure previously acquired by teacher under sections 168.102 to 168.130. Any teacher under sections 168.102 to 168.130 who is called into active military service with the armed forces of the United States is eligible for reinstatement upon his discharge from said service without loss of tenure."

Similarly, Section 168.124, RSMo 1969, provides in part that under certain restrictions, the board of education of a school district may place on leave of absence as many teachers as may be necessary because of a decrease in pupil enrollment, school district reorganization, or the financial condition of the school district.

In connection with the above, it was held in Attorney General's Opinion No. 35, Gould, March 18, 1969, that public school boards may grant leaves of absence with pay to teachers for the purpose of study and professional improvement, and that the agreement to grant leaves must be incorporated in the written terms of the employment contract and must be in exchange for services actually rendered during the contract period and not a gratuity. In addition, it was further pointed out that contributions to the Public School Retirement System should be calculated during the teacher's leave of absence in the same manner as contributions are calculated during periods of actual service (copy of opinion attached). It was also held in Attorney General's Opinion Letter No. 42, Donahoe, May 12, 1972, that the board of trustees of the Public School Retirement System had the authority to adopt a regulation which would permit the Retirement System to receive contributions for a member

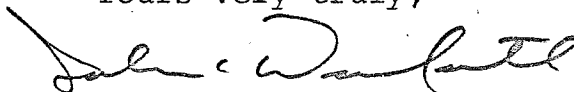
Mr. G. L. Donahoe

who is on a leave of absence from his teaching position with compensation from the employer for the period spent on leave; and the system is authorized to allow membership service credit for the time spent on leave for which contributions were submitted by the employer.

In reviewing the proposed regulation, we note that subsections (a) and (b) which provide that a member will receive credit in the Retirement System if the sabbatical leave is for the purpose of study and professional improvement and is in exchange for services rendered during the contract period and not a gratuity, are taken from Attorney General's Opinion No. 35, Gould, March 18, 1969. In regard to subsection (c) relating to compensation, it is our understanding that when teachers go on sabbatical leave, they normally receive at least 50% of their previous year's salary. Under such circumstances, it is our view that this portion of the regulation is reasonable and not in conflict with subsection 16 of Section 169.010, RSMo, in that a teacher on sabbatical leave is considered to be a "full-time employee" by the employer. Therefore, the teacher and the employer would be required to make contributions to the Retirement System on the full amount of salary paid to teacher while on sabbatical leave, which salary would be not less than 50% of the member's previous year's salary rate.

In conclusion, it is our view that after reviewing the proposed regulation and the statutory authority conferred on the board by the legislature that proposed Regulation No. 2 is within the authority of the board of trustees of the Public School Retirement System to promulgate.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 35
3-18-69, Gould

LAGERS:
PENSIONS:
RETIREMENT:
POLITICAL SUBDIVISION:
COUNTY HEALTH CENTER:

A county health center established pursuant to Chapter 205, RSMo 1969, is not a political subdivision within the meaning of Section 70.600(19), and that the board of trustees of a county health center cannot establish a plan for the pensioning of its officers and employees separate and apart from that provided in Chapter 70, RSMo, providing for the Missouri Local Government Retirement System.

OPINION NO. 225

December 31, 1974

Honorable W. Clifton Banta, Jr.
Prosecuting Attorney
Mississippi County
Post Office Box 469
Charleston, Missouri 63834



Dear Mr. Banta:

This official opinion is in response to your request for a ruling on the following question:

"Can a county health center organized under Chapter 205 RSMo. in a county having an assessed valuation of over \$40,000,000.00 provide for the pensioning of its officers and employees under a plan separate and apart from that provided in Chapter 70 RSMo."

Section 70.615, RSMo 1969, provides:

" . . . except that any political corporation or subdivision of this state, now having or which may hereafter have an assessed valuation of forty million dollars or more, which does not now have a pension system for its officers and employees adopted pursuant to state law, may provide by proper legislative action of its governing body for the pensioning of its officers and employees and the widows and minor children of deceased officers and employees under a plan separate and

W. Clifton Banta, Jr.

apart from that provided in sections 70.600 to 70.670 and appropriate and utilize its revenues and other available funds for such purposes."

The issue, as we view it, is whether a county health center created pursuant to Chapter 205 is either a political subdivision or a political corporation within the meaning of the above section. It is our opinion that it is not.

Section 70.600(19), RSMo Supp. 1973, defines for the purposes of this chapter a political subdivision as:

" . . . any governmental subdivision of this state created pursuant to the laws of this state, and having the power to tax, except public school districts;"

Section 205.010, RSMo 1969, provides that any county may establish a county health center. If the county court is presented with a petition signed by a certain number of qualified voters, the question must be presented to the voters at an election whether the county shall establish and maintain a county health center. A review of the rest of the provisions of Chapter 205 relating to county health centers makes it clear that a county health center is not a separate and distinct entity apart from the county. Rather, it is an arm of the county government. There is a board of trustees elected by the voters to govern the operation of the county health center. Section 205.090 provides that the board of trustees shall make an annual report of their proceedings to the county court and shall also submit to the county budget officer a budget for the ensuing year.

Consequently, it is our view that a county health center is not a separate and distinct entity. It is part of the county government which is a political subdivision of the state.

We note that there is a special statute which defines a county hospital as a "political subdivision" for the purposes of Sections 70.600-70.760, RSMo 1969. (Section 205.192, RSMo Supp. 1973). There is no comparable section applicable to county health centers.

W. Clifton Banta, Jr.

CONCLUSION

Therefore, it is the opinion of this office that a county health center established pursuant to Chapter 205, RSMo 1969, is not a political subdivision within the meaning of Section 70.600(19), and that the board of trustees of a county health center cannot establish a plan for the pensioning of its officers and employees separate and apart from that provided in Chapter 70, RSMo, providing for the Missouri Local Government Retirement System.

The foregoing opinion which I hereby approve was prepared by my assistant, Daniel P. Card II.

Yours very truly,

A handwritten signature in dark ink, appearing to read "J. C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

June 13, 1974

OPINION LETTER NO. 227
Answer by Letter - Burns



Honorable James G. Lauderdale
Prosecuting Attorney
Lafayette County
1017 Franklin Avenue
Lexington, Missouri 64067

Dear Mr. Lauderdale:

This is in answer to your recent opinion request asking as to the effective date of the pay increases as provided for county clerks in third class counties by House Bill 899 of the Second Regular Session of the 77th General Assembly, and third class county prosecuting attorneys under provisions of House Bill 1381 of the Second Regular Session of the 77th General Assembly.

We believe that the questions asked are answered by the enclosed opinions, No. 46, rendered August 15, 1957, to William G. Johnson, and No. 433, rendered December 2, 1965, to Haskell Holman. You will note that Opinion 46 held that a county officer is not entitled to an increase in salary during his term of office when no additional duties are given to the officer and such opinion is the basis for holding that prosecuting attorneys in third class counties will not receive any increase under the provisions of House Bill 1381, if the Governor signs such bill.

Opinion 433 is the basis for holding that the county clerks in third class counties will be entitled, as of August 13, 1974, to the increase in salary provided for by House Bill 899 which was approved May 7, 1974 by the Governor since they are given additional duties and such additional duties are the basis for the salary increase.

Honorable James G. Lauderdale

August 13, 1974 is the effective date for such increase in salary under the provisions of section 29 of Article III of the Constitution of Missouri.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 46
8-15-57, Johnson

Op. No. 433
12-2-65, Holman



OFFICES OF THE

JOHN C. DANFORTH
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

June 10, 1974

OPINION LETTER NO. 228

Mr. James R. Spradling
Director of Revenue
Department of Revenue
Jefferson State Office Building
Jefferson City, Missouri 65101

Dear Mr. Spradling:

This is in response to your request for an opinion on the following questions:

1. May a court of record grant a limited driving privilege for purposes other than in connection with an individual's business, occupation, or employment?
2. Must a person who receives a limited driving privilege keep in force an insurance policy as required by Chapter 303, RSMo, during the period of the limited driving privilege?
3. May a limited driving privilege be granted to a person for a period of time after his license has expired, or to a person who has no current license?

With respect to your first question, it is our opinion that a limited driving privilege can be granted only for the privilege of operating a motor vehicle in connection with the individual's business, occupation, or employment. Section 302.309, sub. 3(2), RSMo 1969, states:

"When any court of record having jurisdiction finds that a chauffeur or operator is

Mr. James R. Spradling

required to operate a motor vehicle in connection with his business, occupation or employment, the court may grant such limited driving privilege as the circumstances of the case justify if the court also finds undue hardship on the individual in earning a livelihood, and while so operating a motor vehicle within the restrictions and limitations of the court order the driver shall not be guilty of operating a motor vehicle without a valid driver's license."

In reading this section, it seems clear that the legislature did not intend to allow courts to extend limited driving privileges for purposes other than business activities. The language of this section refers to business or employment and cannot be used for the granting of limited driving privileges for shopping, medical assistance, post-office visits, recreational activities, or other trips.

With respect to your second question, you have advised us that many limited driving privileges are granted upon a showing that the individual has an insurance policy in effect and has filed the required SR22 form with the Director of Revenue. However, once the privilege has been granted, certain individuals cancel their insurance policy and take no further steps to maintain financial responsibility.

At the time an individual applies for a limited driving privilege, Section 302.309, sub. 3(3), RSMo 1969, requires him to demonstrate proof of financial responsibility as required by Chapter 303, RSMo. Section 303.020(10), RSMo 1969, defines "proof of financial responsibility" as:

" . . . proof of ability to respond in damages for liability, on account of accidents occurring subsequent to the effective date of said proof, arising out of the ownership, maintenance or use of a motor vehicle, . . . "

Section 303.160, RSMo 1969, outlines the various methods of establishing proof of financial responsibility under the law, including a certificate of insurance. Section 303.170, RSMo 1969, requires the insurance company to furnish the Director with a written certificate certifying that there is in effect a motor vehicle liability policy for the benefit of the person required to furnish proof of financial responsibility. This is what is known as the SR22 filing.

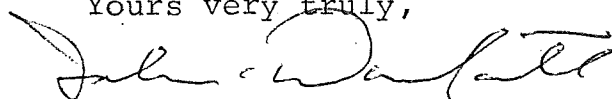
Mr. James R. Spradling

Once this form has been filed with the Director of Revenue, the insurance company cannot cancel or terminate the motor vehicle liability policy without giving the Director at least 10 days notice. See Section 303.210, RSMo 1969. Unless the person involved maintains proof of financial responsibility, no motor vehicle can be registered in his name. See Section 303.160, sub. 2, RSMo 1969. Proof of financial responsibility must be maintained for at least 2 years from the date such proof was required. See Section 303.280, RSMo 1973 Supp.

Having this in mind, it is our opinion that the legislature intended that each person driving under a limited hardship privilege maintain proof of safety responsibility during the entire period of such privilege. Any other interpretation would render the language of Section 302.309 meaningless. The legislature was not concerned with the question of whether or not a person has the capacity of obtaining a liability insurance policy or other proof of financial responsibility; the purpose behind the requirement that every application for a hardship driving privilege be accompanied by proof of financial responsibility is to insure that every motorist driving under such a privilege is capable of providing compensation for any injuries caused by the negligent operation of his motor vehicle. Therefore, a person receiving a limited driving privilege must keep proof of financial responsibility in force during the term of such privilege, either through the maintenance of an insurance policy or one of the other methods available in Section 303.160, RSMo 1969.

Your last question deals with the length of time for which a limited hardship privilege can be granted. As a prerequisite to the granting of any limited hardship privilege, it is necessary that the applicant have had a current license in effect which has been suspended or revoked by the Director of Revenue. However, in granting a hardship privilege pursuant to Section 302.309, a court is not bound by the expiration date on the license under suspension or revocation. Section 302.309, sub. 3(4) states that the court order granting the hardship driving privilege shall indicate the termination date of the order, which shall not be later than the end of the period of suspension or revocation. When issuing a suspension or revocation order, the Director of Revenue is not bound by the expiration date on the license in effect. Likewise, when issuing a hardship driving privilege, the court is not bound by such date but is free to make the hardship privilege co-extensive with the period of suspension or revocation.

Yours very truly,



JOHN C. DANFORTH
Attorney General



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

June 18, 1974

JOHN C. DANFORTH
ATTORNEY GENERAL

OPINION LETTER NO. 229

Honorable Kenneth J. Rothman
Representative, District 77
90 Aberdeen Place
Clayton, Missouri 63105

Dear Representative Rothman:

This letter is in response to your question asking:

"Whether under the Public Defender Bill, it would be a conflict of interest or impermissible for an employee of the Public Defender's Office working part-time under a federal grant and handling misdemeanors only to represent private non-indigent clients in felonies and misdemeanors in the same circuit as the one in which he is a part-time attorney for the Public Defender's Office."

It is our view that such a question should be directed to the Missouri Bar Advisory Committee in view of the authority to rule on such questions given to the Committee under Supreme Court Rule 5.16.

We note that the Committee has already ruled in this area in that in an informal opinion issued January 16, 1974, the Committee held that "... since the Assistant Public Defender himself cannot defend a criminal defendant for a fee this prohibits his partners from doing so as well. . . ." A copy of that opinion is enclosed.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure

THE ADVISORY COMMITTEE

HAROLD W. BARRICK
General Chairman
Sedalia, Missouri

FRED H. MAYER
611 Olive St.
St. Louis, Missouri 63101

PAUL R. SHY
1030 Commerce Tower
Kansas City, Missouri 64105

C. WALLACE WALTER
Landers Building
Springfield, Missouri 65806

J. ANDY ZENGE, JR.
329 Lewis Street
Canton, Missouri 63435

FRED B. HULSE
Special Consultant

THOMAS F. SIMON
Treasurer
Jefferson City, Missouri 65101

MISSOURI BAR ADMINISTRATION

BAR COMMITTEES

POST OFFICE BOX 349
SEDALIA, MISSOURI 65301

January 16, 1974

TELEPHONE
816-826-7890

Mr. Ellsworth Cundiff, Jr.
Attorney at Law
524 Jefferson Street
St. Charles, Missouri 63301

Re: Assistant Public Defenders

Dear Mr. Cundiff:

The Advisory Committee has considered your question as to whether partners of an Assistant Public Defender can represent a criminal defendant for a fee. It is our conclusion that since the Assistant Public Defender himself cannot defend a criminal defendant for a fee this prohibits his partners from doing so as well. We feel that to rule otherwise would allow the Assistant Public Defender to share in the fees for criminal defense, which the Statute apparently intends to prohibit.

This is an informal opinion and will not be published at this time.

Sincerely,

Harold W. Barrick
General Chairman

HWB/cam

COPY



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

August 23, 1974

OPINION LETTER NO. 230

Mr. James L. Wilson, Director
Department of Natural Resources
Jefferson State Office Building
Jefferson City, Missouri 65101

Dear Mr. Wilson:

This letter is in reply to your request for an opinion on the questions stated below:

- "1. Is the attached Boone County Ordinance restricting the use of septic tanks a valid exercise of power by Boone County? [The ordinances attached with your opinion request are the Boone County Zoning Regulations and Subdivision Regulations adopted December 27, 1973.]
- "2. Can Boone County Zoning Regulations validly require that all individual sewer systems be approved by the Missouri Clean Water Commission?
- "3. Does the Missouri Clean Water Commission presently have authority to regulate individual sewage disposal systems to prevent pollution of waters of the state?
- "4. In the event the Missouri Clean Water commission does not have the authority to regulate, what governmental body has such authority?
- "5. What authority determines whether an approved and adequate sanitary sewer system is reasonably accessible within the meaning of Article VII, §§ 2(c)(1)(2) and (3) of the Boone County Zoning Regulations?

Mr. James L. Wilson

- "6. Does Article VII, Section 2(c)(2) of the Boone County Zoning Regulations allow persons to install septic tanks on a temporary basis if there are provisions which would require them to eventually connect to a sanitary sewer?"

The specific sections of the Boone County Subdivision Regulations mentioned in your opinion request are as follows:

"ARTICLE VII - REQUIRED IMPROVEMENTS

* * *

"2. Minimum Requirements

* * *

"(c) Sewage Disposal

"(1) Where an approved and adequate public or privately owned sanitary sewer system is reasonably accessible, that meets the requirements of the Missouri Clean Water Commission and standards of Boone County, the developer shall connect with such sanitary sewer and provide adequate sewer lines with individual connections to each lot subject to the approval of the sewer district having jurisdiction.

"(2) Where an approved public or privately owned sanitary sewer is not reasonably accessible, but where plans for installations of sanitary sewers in the vicinity of the subdivision have been approved by the Clean Water Commission, the developer shall install sewers in conformity with such plans, although a connection to an existing main may not be immediately practicable. In such cases, and until a connection is made with an approved public or privately owned sewage system, the use of a temporary sewage treatment facility will be permitted, provided such disposal facilities are constructed in accordance with the regulations and requirements of the Clean Water Commission.

Mr. James L. Wilson

"(3) Where no sewers are accessible and no plans for same have been prepared, the developer shall install sewer lines and a disposal system in accordance with the requirements of the preceding paragraph. If the subdivided lots have a minimum width of two-hundred fifty (250) feet and contain a minimum area of three acres or more, he may instead install an individual sewage disposal system for each lot, but each such individual disposal sewage system shall comply with such guidelines adopted as regulations by Boone County Court, and additional regulations of Boone County Court regarding individual sewage disposal facilities and be constructed under the observation and inspection of, and approved by Boone County Public Works Department."

Boone County is a county of the second class. With regard to your first question concerning the power of a second class county, namely, Boone County, to establish regulations concerning sewage disposal, the subject of regulation of sewage disposal facilities with relation to building codes was treated in Opinion No. 317, 1967, previously issued by this office, determining that through the medium of building codes, a second class county does have such authority. In addition to the authority cited in that earlier opinion, Section 64.825, RSMo 1969, provides inter alia that with relation to second class counties:

"The county planning commission may also prepare, with the approval of the county court, . . . sets of regulations governing subdivisions of land in unincorporated areas, . . . Such regulations may . . . include the extent to which . . . sewer and other utility services shall be provided, to protect public health and general welfare. . . ."

Substantially the same language is found in Section 64.580, RSMo 1969, and a county is free to proceed under the alternative provisions of either of these sections. The Boone County Subdivision Regulation states that it was adopted pursuant to the provisions of Section 64.825 (and 64.840), RSMo 1969, so this opinion will deal with that section and sections related to that alternative statutory scheme, Sections 64.800 to 64.880, RSMo 1969.

As pointed out in the earlier 1967 opinion:

Mr. James L. Wilson

"It is the opinion of this office that under Sections 64.170, RSMo Cum. Supp. 1965, and 64.180, RSMo 1959, counties of the first and second class may adopt building codes which include provisions for the regulation of plumbing installation and sewage disposal."

That earlier opinion remains in effect and pursuant to it and the provisions of Section 64.825, RSMo (and 64.580), we conclude that the county has authority to regulate the use of septic tanks in Boone County. Whether the specific Boone County regulation is a valid exercise of that power, however, is a question which must be addressed to the Boone County Prosecuting Attorney.

There are certain other sections of the Boone County Zoning and Subdivision Regulations (which are separate regulations) which should be noted for the purposes of this opinion.

Article III, paragraph 31 of the Subdivision Regulations defines subdivision as follows:

"The term 'subdivision' means the division of a parcel of land into two or more lots or parcels for development or, if a new street is involved, any division of a parcel of land; provided that a division of land for agricultural purposes and not involving a new street shall not be deemed a subdivision and, when appropriate to the context, shall relate to the process of subdividing or to the land subdivided. The term 'subdivision' shall also include all resubdivision of land or lots. The division of a lot one time into two parcels, each of which is ten acres or more, shall not be considered a subdivision."

In Section 8 of the Zoning Regulations on page 19, the county provides for minimum lot areas and widths. Then the following appears:

"Where public or community sewers are not available, suitable sewage disposal systems shall be designed in accordance with the Clean water Commission Requirements and plans prepared by a registered professional engineer.

"Septic tanks shall be prohibited for any individual sewage disposal system in areas

Mr. James L. Wilson

bounded as follows: R12 twn 47 North half of the Northwest quarter of Section 18, Northeast quarter of Section 18, Northwest quarter of Section 17, North half of Northeast quarter of Section 17, Southeast quarter of Section 8, Southwest quarter of Section 8, Southeast quarter of Section 7, Southwest quarter of Section 7, East half of Southeast quarter of Section 12."

Considering your second question whether Boone County, a second class county, can adopt regulations which require that all individual sewer systems be approved by the Clean Water Commission, the point is somewhat obscure but there appears to be no improper delegation of authority in requiring approval or compliance with state standards, since such a regulation does not purport to give the Clean Water Commission any powers it does not already possess. Schnider v. State, 38 Cal.2d 439, 241 P.2d 1, 43 A.L.R.2d 1068 (Cal. Bank 1952).

However, there does appear to be a problem whenever such regulations require approval beyond that which the Missouri Clean Water Commission would normally undertake to give. Although the statutory power of the Clean Water Commission to regulate to prevent water pollution extends to any source in the state which would cause pollution, Section 204.026.8 and 16, RSMo Supp. 1973, and so would extend to subdivisions with fewer than ten lots or parcels, its policy as set forth in its regulations for the disposal of wastewater in subdivisions, CWC-R9, is to require prior approval only for subdivisions containing ten or more lots. Since the Boone County definition of subdivision applies to divisions of land into two or more lots, it appears that Boone County in many instances would require the Clean Water Commission to approve individual sewer systems in subdivisions for which it has made a policy determination not to require advance approval. This would be in effect a direction by Boone County to the Clean Water Commission for action in excess of the normal activity of the Commission, and therefore a direction beyond any authority of a second class county which this office has been able to locate.

Your third question inquires whether the Missouri Clean Water Commission presently has authority to regulate individual sewage disposal systems to prevent pollution of waters to the state.

The term "water contaminant" is defined in Section 204.016(12) of the Missouri Clean Water Law as:

Mr. James L. Wilson

". . . any particulate matter or solid matter or liquid or any gas or vapor or any combination thereof, or any temperature change which is in or enters any waters of the state either directly or indirectly by surface runoff, by sewer, by subsurface seepage or otherwise, which causes or would cause pollution upon entering waters of the state, or which violates or exceeds any of the standards, regulations or limitations set forth in sections 204.006 to 204.141 or any federal water pollution control act, or is included in the definition of pollutant in such federal act;"

A discharge from sewage systems would fit within that definition as matter or liquid which would cause pollution upon entering any waters of the state, or, as specifically included within the definition of pollutant in the Federal Water Pollution Control Act. The federal act definition of pollutant reads as follows:

"The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. . . ." Section 502(6), Federal Water Pollution Control Act Amendments of 1972, Public Law 92-500, 92 Congress, 2nd Session.

Section 204.051.1, RSMo Supp. 1973, provides that it is unlawful for any person:

"(1) To cause pollution of any waters of the state or to place or cause or permit to be placed any water contaminant in a location where it is reasonably certain to cause pollution of any waters of the state;"

Section 204.076.1, RSMo Supp. 1973, provides that:

"It is unlawful for any person to cause or permit any discharge of water contaminants from any water contaminant or point source located in Missouri in violation of sections 204.006 to 204.141, or any standard, rule or regulation promulgated by the commission.

Mr. James L. Wilson

In the event the commission or its executive secretary determines that any provision of sections 204.006 to 204.141 or standard, rules, limitations or regulations promulgated pursuant thereto, or permits issued by, or any final abatement order, other order, or determination made by the commission or the executive secretary, or any filing requirement under sections 204.006 to 204.141 or any other provision which this state is required to enforce under any federal water pollution control act, is being, was, or is in imminent danger of being violated, the commission or executive secretary may cause to have instituted a civil action in any court of competent jurisdiction for the injunctive relief to prevent any such violation or further violation or for the assessment of a penalty. . . ."

Section 204.026 provides that the Commission shall:

"(8) Adopt, amend, promulgate, or repeal after due notice and hearing, rules and regulations to enforce, implement, and effectuate the powers and duties of sections 204.006 to 204.141 and any required of this state by any federal water pollution control act, and as the commission may deem necessary to prevent, control and abate existing or potential pollution;

* * *

"(16) Establish effluent and pretreatment and toxic material control regulations to further the purposes of sections 204.006 to 204.141 and as required to insure compliance with all effluent limitations, water quality related effluent limitations, national standards of performance and toxic and pretreatment effluent standards, and all requirements and any time schedules thereunder, as established by any federal water pollution control act for point sources in this state, and where necessary to prevent violation of water quality standards of this state;"

Mr. James L. Wilson

Pursuant to these provisions, the Clean Water Commission has authority to regulate individual sewage disposal systems, including septic tanks, to prevent pollution of and the discharge of water contaminants to waters of the state, and in fact has adopted the subdivision regulations referred to above which do restrict or regulate the use of individual sewage disposal systems in subdivisions. Therefore, the Commission has the authority to regulate such systems, and violation of its regulations would be subject to the provisions of Section 204.076, RSMo Supp. 1973, quoted above. In addition, Section 204.051.1(1), RSMo Supp. 1973, set forth above, declares it to be unlawful to use any water contaminant source, which would include an individual sewage treatment system, which would cause or be reasonably certain to cause pollution of any waters of the state, hence such system posing such a threat would be subject to the authority of the Clean Water Commission.

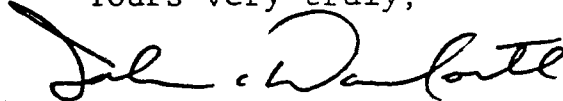
Your question four asks:

"In the event the Missouri Clean Water Commission does not have the authority to regulate, what governmental body has such authority?"

As stated above, it is our opinion that the Missouri Clean Water Commission does have authority to regulate individual sewage disposal systems.

With regard to questions five and six, it is the policy of this office to refer questions concerning the interpretation of local ordinances to the adopting governmental body. Therefore, these questions should be directed to the prosecuting attorney of Boone County for an answer.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

REORGANIZATION ACT:
DEPARTMENT OF NATURAL RESOURCES:

(1) The positions of executive secretary of the Air Conservation Commission,

Clean Water Commission, and Inter-Agency Council for Outdoor Recreation are abolished and the director of the Department of Natural Resources shall cause the policies of these boards to be executed and directors of staff shall be appointed by the director of the department to service these agencies; (2) there is no position comparable to "executive secretary" for the Soil and Water Districts Commission and the director of the department shall cause the policies of this commission to be executed and shall appoint a director of staff to service the commission; (3) the director of the department shall cause the policies of the Oil and Gas Council to be executed and shall appoint a state geologist who shall serve as director of staff to the council; (4) the position of director of the Land Reclamation Commission continues and the commission shall select such director who shall be the "director of staff"; and (5) none of the above positions are merit positions under Chapter 36, RSMo.

OPINION NO. 235

June 18, 1974

Honorable Christopher S. Bond
Governor of Missouri
Executives Offices
State Capitol Building
Jefferson City, Missouri 65101



Dear Governor Bond:

This is in reply to your request for an opinion concerning the status of the chief executive officer for each of the various boards and commissions transferred pursuant to the "Omnibus State Reorganization Act of 1974" (Senate Bill No. 1, First Extraordinary Session, 77th General Assembly) by Type II transfer to the Department of Natural Resources. The boards and commissions in question are the Air Conservation Commission, Clean Water Commission, Soil and Water Districts Commission, State Oil and Gas Council, Land Reclamation Commission, and the Inter-Agency Council for Outdoor Recreation.

The general question is whether, for example, for the Air Conservation Commission there will continue to be a position of "executive secretary," as such, or whether this position is in effect abolished by Senate Bill No. 1. Also, you inquire as to the status of such position as a merit system position.

Honorable Christopher S. Bond

Because the questions are common for the various boards and commissions and because the answers for one will generally typify the answers for all, we will for convenience first fully analyze the position of executive secretary for the Air Conservation Commission.

Section 203.040.4, RSMo 1973 Supp., of the Missouri Air Conservation Law, provides as follows:

"The commission shall appoint an executive secretary who shall act as its administrative agent and he shall be qualified, by education, training and experience, in technical matters in air contaminant control.
. . ."

The executive secretary is, throughout the law and more particularly in Section 203.060, RSMo 1973 Supp., given certain powers and duties, including the right to issue orders, file complaints, and take similar official actions.

As stated above, the Air Conservation Commission has now been transferred by Type II transfer to the Department of Natural Resources. Section 10.3, Senate Bill No. 1, provides in part:

". . . The bodies hereby transferred shall retain all rule making and hearing powers allotted by law, . . ."

Then, subsection 1 of Section 10 of Senate Bill No. 1 provides, in part, as to the powers of the director of the Department of Natural Resources:

". . . The director shall administer the programs assigned to the department relating to environmental control and the conservation and management of natural resources. The director shall coordinate and supervise all staff and other personnel assigned to the department. He shall faithfully cause to be executed all policies established by the boards and commissions assigned to the department, be subject to their decisions as to all substantive and procedural rules and his decisions shall be subject to appeal to the board or commission on request of the board or commission or by affected parties. . . ."

Honorable Christopher S. Bond

Since under Chapter 203 the executive secretary now administers the air conservation program, it is obvious that the legislature intended that this function under reorganization be performed by the director of the department. Therefore, the position of "executive secretary" has been abolished and all the statutory functions of Chapter 203 are now to be performed by the director. In other words, for each instance where "executive secretary" is used in Chapter 203 it should now read "director of the department of natural resources."

It should be readily apparent, considering the number of boards and commissions and the important functions of the boards and commissions involved in the department, that the director would have great difficulty in regularly meeting with and administering personally to these boards and commissions. Therefore, the legislature provided as follows:

"The director shall appoint directors of staff to service each of the policy making boards or commissions assigned to the department. Each director of staff shall be qualified by education, training and experience in the technical matters of the board to which he is assigned and his appointment shall be approved by the board to which he is assigned and he shall be removed or reassigned on their request in writing to the director of the department. All other employees of the department and of each board and commission assigned to the department shall be appointed by the director of the department in accord with chapter 36 RSMo and shall be assigned and may be reassigned as required by the director of the department in such a manner as to provide optimum service, efficiency and economy." Section 10.2, Senate Bill No. 1.

This function further shows the intent that the position of "executive secretary" has been abolished, for to hold otherwise would suggest two positions, that of "executive secretary" and that of "director of staff," which positions would virtually duplicate each other. Therefore, the director will carry out his statutory duties to the Air Conservation Commission primarily through his director of staff. Of course, he will still have to personally take all formal actions under Chapter 203, such as the issuance of orders.

Honorable Christopher S. Bond

We do note the language in Section 1.7(1)(b), Senate Bill No. 1, defining a Type II transfer, where it is stated:

"Under this act a type II transfer is the transfer of a department, division, agency, board, commission, unit, or program to the new department in its entirety with all the powers, duties, functions, records, personnel, property, matters pending, and all other pertinent vestiges retained by the department, division, agency, board, commission, unit or program transferred subject to supervision by the director of the department. . . ."

This language is suggestive that the Air Conservation Commission would retain the function of employing personnel including the appointment of an executive secretary. However, the definition of a Type II transfer then continues as follows:

". . . Supervision by the director of the department under a type II transfer shall include, but shall be limited to: budgeting and reporting under subdivisions (4) and (5) of subsection 6 of this section; to abolishment of positions, other than division, agency, unit or program heads specified by statute; to the employment and discharge of division directors; to the employment and discharge of employees, except as otherwise provided in this act; to allocation and reallocation of duties, functions and personnel; and to supervision of equipment utilization, space utilization, procurement of supplies and services to promote economic and efficient administration and operation of the department and of each agency within the department. Supervision by the director of the department under a type II transfer shall not extend to substantive matters relative to policies, regulative functions or appeals from decisions of the transferred department, division, agency, board, commission, unit or program, unless specifically provided by law. . . ."

It is obvious from reading this entire definition that the intent is that on the date of transfer all personnel and property are transferred to the new department with personnel and funding matters under the direct supervision of the director. We find

Honorable Christopher S. Bond

this definition consistent with Section 10 and our conclusion above, in that the Commission still sets all air conservation policy. We find nothing in this section which conflicts with our view that Section 10 has abolished the position of "executive secretary."

Next then is the merit system question which has been prompted by Section 1.6(8), Senate Bill No. 1, and the fact that the position of "executive secretary" is a merit system position. Section 1.6(8) provides:

"Nothing in this act shall be construed so as to remove any state agency or unit thereof or any position of employment from coverage under the provisions of the merit system law if the agency or position was covered by that law on the effective date of this act."

Since the "position" of "executive secretary" was a merit system position, it follows that under this provision such "position" would continue as a merit system position. That is, of course, if there continues to be such a position. However, since this position has been abolished, then under the plain meaning of Section 1.6(8) there is obviously no longer such a merit position. And, we note that the director of staff appointed to the Air Conservation Commission is not a merit system employee. Section 10.2.

We have examined the Clean Water Law, Chapter 204, RSMo, which provides for an executive secretary in virtually the same manner as the Air Conservation Law. Accordingly, we also hold that this position has been abolished. The same answer also applies on the merit system question.

The Soil and Water Conservation Districts Law, Chapter 278, RSMo, does not provide for a position comparable to that of "executive secretary," but merely provides the commission may employ such assistants as it may require. Accordingly, the above analysis is unnecessary since there is no such position in question as to whether it has been abolished. Therefore, the director of the Department of Natural Resources shall accordingly carry out the policies of the commission through the appointment of a director of staff, as provided in Section 10, Senate Bill No. 1.

The State Oil and Gas Law, Chapter 259, RSMo, provides for an administrator for the council who is the state geologist (Section 259.030.2) and who is also a member of the council. Section 259.010. The powers, duties, and functions of the state geologist

Honorable Christopher S. Bond

are transferred by Type I transfer to the department. However, here there is a specific provision as to how the director of the department will carry out the powers, duties, and functions of the state geologist. Section 10.5, Senate Bill No. 1, provides in part:

". . . The director of the department shall appoint a state geologist who shall have the duties to supervise and coordinate the work formerly done by the departments or authorities abolished by this subsection, and shall provide staff services for the state oil and gas council."

Accordingly, it is our view that the director of the department must appoint a state geologist who shall then serve as director of staff to the State Oil and Gas Council. Since this position has not previously been a merit position, it would not now be a merit position.

The Land Reclamation Law, Section 444.500 et seq., RSMo, provides for a "director of the commission," which position is comparable to that of "executive secretary." However, the legislature has made specific provision as to the powers of this commission which are different from any other Type II commission in the department. Section 10.6, Senate Bill No. 1, provides in part:

". . . All necessary personnel required by the commission shall be selected, employed and discharged by the commission. The director of the department shall not have the authority to abolish positions."

The legislature by using broad language that "all necessary personnel required . . . shall be selected" as well as "employed" clearly intended that there continue to be a director who is appointed by the commission. In addition to this position of director selected by the commission, the commission also has the power to employ all other personnel. Further, since this position of director has not previously been a merit position, it would not now be a merit position.

Finally, Section 288.040.2, RSMo, provides for an executive secretary for the State Inter-Agency Council for Outdoor Recreation. Subsection 8(2) of Section 10 specifically provides that the "office of executive secretary to the council is abolished." Therefore, the director of the department should appoint a director of staff to service the council. Accordingly, this position would also not be a merit position.

Honorable Christopher S. Bond

CONCLUSION

It is the opinion of this office that: (1) the positions of executive secretary of the Air Conservation Commission, Clean Water Commission, and Inter-Agency Council for Outdoor Recreation are abolished and the Director of the Department of Natural Resources shall cause the policies of these boards to be executed and directors of staff shall be appointed by the director of the department to service these agencies; (2) there is no position comparable to "executive secretary" for the Soil and Water Districts Commission and the director of the department shall cause the policies of this commission to be executed and shall appoint a director of staff to service the commission; (3) the director of the department shall cause the policies of the Oil and Gas Council to be executed and shall appoint a state geologist who shall serve as director of staff to the council; (4) the position of director of the Land Reclamation Commission continues and the commission shall select such director who shall be the "director of staff"; and (5) none of the above positions are merit positions under Chapter 36, RSMo.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Yours very truly,



JOHN C. DANFORTH
Attorney General

CREDIT UNIONS:
REORGANIZATION ACT:

The Director of the Division of Credit Unions in the Department of Consumer Affairs, Regulation, and Licensing is not required to meet the qualifications expressed in Section 370.100, RSMo 1973 Supp.

OPINION NO. 236

June 13, 1974



Honorable Christopher S. Bond
Governor of Missouri
Executive Offices
State Capitol Building
Jefferson City, Missouri 65101

Dear Governor Bond:

This is in response to your request for an opinion to the following question:

"Must the director of the Division of Credit Unions, as provided in section 3.7 of Senate Bill No. 1, meet the requirements of section 370.100 RSMo 1969?"

Section 370.100, RSMo 1973 Supp., describes the powers and qualifications of the supervisor of credit unions. Section 1 of Section 370.100 states:

"There is created within the state division of finance, a supervisor of credit unions who shall have exclusive supervision of all credit unions operating under the laws of this state and may make necessary rules and regulations to carry out the provisions of this chapter."

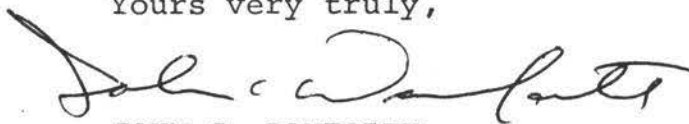
Section 4 of Section 370.100 states:

"No person shall be eligible to be appointed to the office unless he has had at least three years actual practical experience with credit union operations or unless he has served for

Honorable Christopher S. Bond

The foregoing opinion, which I hereby approve, was prepared by my assistant, Andrew Rothschild.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

September 3, 1974

OPINION LETTER NO. 238
Answer by letter-Klaffenbach

Honorable Frank Bild
State Senator, District 15
7 Meppen Court
St. Louis, Missouri 63128



Dear Senator Bild:

This letter is in response to your question asking:

"Does the Board of Aldermen of a City of the Fourth Class have the power and authority to pass an ordinance restricting the number of terms which an individual may be elected as Mayor, as Alderman, or elected as any other City official of a Fourth Class City?"

Section 79.250, RSMo, with respect to city officers provides:

"All officers elected or appointed to offices under the city government shall be qualified voters under the laws and constitution of this state and the ordinances of the city except that appointed police officers, the city attorney, and other employees having only ministerial duties need not be registered voters of the city. No person shall be elected or appointed to any office who shall at the time be in arrears for any unpaid city taxes, or forfeiture or defalcation in office. All officers, except appointed police offices, the city attorney, and other employees having only ministerial duties, shall be residents of the city."

Neither this section nor the Missouri Constitution prohibit city officers from being elected to more than one term. Further,

Honorable Frank Bild

there is no such prohibition in Section 79.050, RSMo, which provides for the terms of elective officers of fourth class cities.

Likewise, there is no statutory or constitutional provision which expressly authorizes ordinances restricting such terms of office. Therefore, the question is whether such an ordinance would be repugnant to state law.

In Ervin v. Collins, 85 So.2d 852, 858 (Fla. Banc 1956), the Supreme Court of Florida held:

" . . . It is the sovereign right of the people to select their own officers and the rule is against imposing disqualifications to run. The lexicon of democracy condemns all attempts to restrict one's right to run for office. . . . Florida is committed to the general rule in this country that the right to hold office is a valuable one and should not be abridged except for unusual reason or by plain provision of law. . . ."

It is our view that the legislature has provided for the qualifications and terms of such officers and in so doing, has clearly declined to impose such limitations. Since the legislature has undertaken to express the legislative will with respect to the subject, any such limitations imposed on the office or on the electorate by ordinance would be repugnant to state law and invalid. (Cf. Morley v. Ryan, 461 S.W.2d 7 (Mo. 1970)).

We have no state legislative proposal before us and, therefore, do not rule on any question respecting the validity of action by the General Assembly on this subject.

Very truly yours,

JOHN C. DANFORTH
Attorney General



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

September 3, 1974

OPINION LETTER NO. 241

Harold P. Robb, M.D.
Director, Department of Mental Health
722 Jefferson Street
Jefferson City, Missouri 65101

Dear Dr. Robb:

This letter is in response to your question asking:

"Does Section 202.905 V.A.M.S. set out below, require the licensing of private homes utilized by the Vocational Rehabilitation Units at the State Schools and Hospitals for work placement which includes residential placement for the mentally retarded?

Section 202.905 V.A.M.S. reads as follows:

202.905 Licensing procedure to be established--
annual fees--exceptions

The division [now Department of Mental Health] shall establish a procedure for the licensing of all homes or institutions which accept mentally retarded persons for care, treatment or custody, except those state institutions operated by it. Applications for a license shall be made to the division upon forms provided by it and each application shall contain such information as the division requires, which may include affirmative evidence of ability to comply with the reasonable rules, regulations and standards adopted by the board. Each application

Harold P. Robb, M.D.

for a license, except applications from a governmental unit, shall be accompanied by an annual license fee of seventy-five dollars for establishments which accept less than ten patients, and one hundred fifty dollars from establishments which accept ten or more. All license fees shall be paid to the collector of revenue for deposit in the general revenue fund of the State treasury."

You further state that:

"The Vocation Rehabilitation Units operated by the State Department of Education and the Division of Mental Health often find domestic work positions for retarded patients. The patients live in the private residence and earn their room and board and a small salary by performing domestic chores. It has been our position that these homes were not providing 'care, treatment, or custody' within the meaning of 202.905."

It is our further understanding that your question concerns only the placement of patients in private family homes under the provisions of Section 202.831, RSMo Supp. 1973, which provides as follows:

"1. The head of a state mental facility, with the consent of the person responsible for the commitment of the patient or of one of the parents, if living, having been first obtained, may place any patient, except those committed as criminally insane, in a licensed boarding, or licensed nursing home or family home upon such terms and conditions as he deems proper when he believes that such family care would benefit the patient. If the patient so placed is ineligible to receive public assistance benefits from the division of welfare, or such benefits are inadequate to meet the costs of such care, the monthly costs may be paid or supplemented out of funds appropriated for that purpose to the division of mental health; but the payment for such care shall not exceed the average per capita cost of maintenance for the prior fiscal year of patients in the state facility from which he is transferred. The

Harold P. Robb, M.D.

payment made by the parent or guardian for such care shall not exceed the amount paid the state hospital.

"2. The division shall arrange for or make inspections and visits in the home in which the patient has been placed, provide adequate medical care, and may, with the consent of the person responsible for the commitment of the patient or of one of the parents, if living, return the patient to the facility or place him in another home when deemed advisable.

"3. The placement of a patient in a licensed boarding or licensed nursing home or family home shall be considered as a conditional release from the facility but shall not relieve the county of the patient's residence or those responsible for the support of a private patient, as the case may be, from the obligations imposed upon them by law for the support and maintenance of the patient if payments are made from funds appropriated to the division of mental health for such care.

"4. The division of welfare through its county welfare offices shall cooperate with the state mental facilities and the division of mental health in locating licensed boarding or licensed nursing homes or family homes, making visits and inspections in such homes, and submitting reports regarding the homes and patients placed therein."

We do not believe that the mere fact that a placement of a retarded person is made under Section 202.831 necessarily leads to the conclusion that private family homes must be licensed under Sections 202.900, RSMo Supp. 1973 et seq. The primary question with respect to whether or not licensure is required is whether or not such persons are accepted "for care, treatment or custody" within the meaning of Section 202.905, which you have quoted. The determination of whether or not such persons are accepted for care, treatment or custody is a question of fact which must be determined by the Department in each case. In making such determinations we believe that it is competent for the Department to adopt such rules, regulations or guidelines as may be required.

Harold P. Robb, M.D.

The additional question has been raised as to whether or not the fact that the Department may be making some patient support payments under Section 202.831 is determinative as to whether the placement comes within Section 202.905. It is our view that such payments are not determinative as to whether the placement is within the licensure provisions although the amount of payment may be factually indicative of the nature of the placement and relative to the determination of the question of whether care, treatment or custody is provided such patient so as to bring him within the provisions of Section 202.905.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

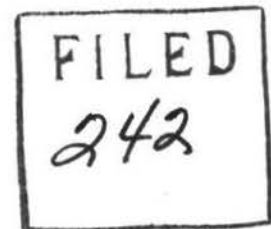
JOHN C. DANFORTH
Attorney General

DENTISTS: (1) Dentists are not authorized
DEATH CERTIFICATES: to conduct a complete physical
PHYSICIANS: evaluation of a patient and (2)
DOCTORS: dentists are not physicians
within the meaning of Section
193.140 authorizing physicians to certify cause of death on a
death certificate.

September 17, 1974

OPINION NO. 242

James L. Anderson, D.D.S., Secretary
Missouri Board of Dental Examiners
P. O. Box 237
Harrisonville, Missouri 64701



Dear Dr. Anderson:

This is in response to your request for an official opinion
on the following questions:

"Do dentists licensed under the Dental
Practice Act, Chapter 332, RSMo, have the
authority under that license to perform
complete physical evaluation of their
patient and sign death certificates."

In dealing with these questions, it must be recognized
that a license to practice dentistry is a limited authoriza-
tion as opposed to the general authorization to practice
medicine. This is indicated by Section 334.155, RSMo 1969,
which provides that the chapter on physicians and surgeons
shall not apply to dentists licensed and lawfully practicing
within the provisions of Chapter 332. Thus, any practice in
the way of the healing arts, not specifically authorized by
Chapter 332 falls within the purview of Chapter 334 and would
require licensure thereunder.

It appears from the facts set forth in your request that
the Joint Commission on Accreditation of Hospitals requires a
complete physical appraisal of dental patients upon admittance
to a hospital and that hospitals have been requiring these to
be performed by physicians. In this context, we understand
your question to be whether, if allowed by the individual
hospital, a dentist is authorized to perform such an evaluation.

James L. Anderson, D.D.S., Secretary

The Oxford English Dictionary defines diagnosis as "determination of the nature of a diseased condition; identification of a disease by careful investigation of its symptoms and history; also, the opinion (formally stated) resulting from such investigation." In light of this definition, it appears to us that a medical appraisal based upon physical examination and medical history would constitute a general diagnosis of a patient's condition. Section 332.071 (2), RSMo 1969, defines the practice of dentistry to include diagnosis of any disease, pain, deformity, deficiency, injury or physical condition of human teeth or adjacent structures or treatment of any disease or disorder or lesion of the oral regions. In view of this limited scope of diagnosis and treatment, it is our opinion that a dentist is not authorized under Chapter 332 to perform a general evaluation of a patient's physical condition.

The States of Pennsylvania and California do allow dentists to perform general physical evaluations of patients. It must be noted, however, that these states have specific statutory provisions authorizing this. 63 P.S., §121, cumulative pocket part 1974; West's Ann. Cal. Bus. and Prof. Code, §1625.

As to the question of whether dentists can sign death certificates, this office has previously answered this question in the negative in Opinion No. 37, Hardwicke, August 1, 1957. This opinion involved a construction of Section 193.140, RSMo 1969, which provides for the certification of cause of death by the physician last in attendance. The opinion concluded that a dentist was not a physician within the meaning of this statute. It should also be noted that Section 193.020 (6), RSMo 1969, defines a physician as one legally authorized to practice medicine in this state. Section 334.021, RSMo 1969, provides that:

"Where other statutes of this state use the terms 'physician', . . . 'practitioner of medicine', . . . or similar terms, they shall be construed to mean physicians and surgeons licensed under this chapter. . . ."

A dentist, not being licensed under Chapter 334, is not a physician within the meaning of Chapter 193.

Oklahoma does allow a dentist to sign a death certificate. However, the Oklahoma vital statistics statute defines a physician as a person licensed to practice any of the healing

James L. Anderson, D.D.S., Secretary

arts under the laws of that state. 63 Okla. St. Ann., §1-301 (i).

CONCLUSION

It is the opinion of this office that (1) dentists are not authorized to conduct a complete physical evaluation of a patient and (2) dentists are not physicians within the meaning of Section 193.140 authorizing physicians to certify cause of death on a death certificate.

This opinion, which I hereby approve, was prepared by my assistant, Robert Presson.

Very truly yours,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH
Attorney General



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

July 11, 1974

OPINION LETTER NO. 244

Honorable Thomas W. Shannon
Prosecuting Attorney
City of St. Louis
1320 Market Street
St. Louis, Missouri 63103

Dear Mr. Shannon:

This is in response to your request for an opinion as to the types of traffic offenses which can be placed within the authority of the violations clerk of a traffic violations bureau, as created under Supreme Court Rule 37.50.

You have informed us that the Court of Criminal Corrections in St. Louis wishes to establish a "traffic violations bureau" under Rule 37.50 and a question has arisen as to whether or not certain traffic offenses can be placed under the authority of the violations clerk. Specifically, the list of offenses includes the following:

- "a. Failure to display operator's license
- "b. Expired vehicle license
- "c. No vehicle license"

Supreme Court Rule 37.50(b) states that the court can designate the traffic offenses to be within the authority of the violations clerk, with the following proviso:

" . . . provided that such designated offenses shall in no event include Traffic Cases involving property damage or personal injury, operation of a motor vehicle while under the influence of intoxicating liquor or drugs or

Honorable Thomas W. Shannon

permitting another person under such influence to operate a motor vehicle owned by the defendant or in his custody or control, speeding in excess of 10 miles an hour above the legal speed limit, any second speeding offense in a two-year period, driving without license but not expired license when within 60 days after expiration, driving when license is suspended or revoked, or leaving the scene of an accident. The Court, by published order to be prominently posted in the place where the fines are to be paid, shall specify by suitable schedules the amount of fines to be imposed for first and subsequent offenses, designating each offense specifically in the schedules, provided such fines are within the limits declared by law. Fines and costs shall be paid to, receipted by and accounted for by the Violations Clerk in accordance with these Rules." (Emphasis added)

It seems clear that the Supreme Court did not intend, except for carefully defined exceptions, to restrict the magistrate and municipal courts and courts of criminal corrections with respect to the types of traffic offenses to be included within the authority of the violations clerk of the traffic violations bureau.

It is our opinion that the examples listed in your request do not fall within the exceptions listed in Supreme Court Rule 37.50(b). The reference to licenses within the Supreme Court rule refers to operator's or chauffeur's licenses and not to license plates for motor vehicles. The traffic offense of failure to display an operator's license is not the same as driving without a license and therefore is not within the proviso. Examples "b" and "c," although traffic offenses, deal with improper motor vehicle registration and not with licenses as that term is used in Supreme Court Rule 37.50(b). Accordingly, the traffic offense of driving a motor vehicle which is not currently registered can be placed within the authority of the violations clerk of the traffic violations bureau.

Yours very truly,



JOHN C. DANFORTH
Attorney General

July 12, 1974

OPINION LETTER NO. 245
Answer by letter-Nowotny

Mr. Robert L. James
Commissioner
Office of Administration
State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. James:

This is in reply to your request for an opinion of this office concerning the question of whether the office of Administration, Division of Accounting, has authority to withhold from an employee's compensation an amount for the purchase of credit union shares for any credit union other than the Missouri State Employees' Credit Union, and further asking whether the Office of Administration can make any deduction which is not specifically provided for by statute.

In Opinion Letter No. 190, September 28, 1965, Vaughn, this office held that the State Comptroller did not have the authority to deduct monthly contributions for the United Community Fund from the paychecks of state employees who request such deduction. The basis for this holding was that the Comptroller only has such powers as are expressly granted or necessarily implied. The opinion then recognized that Section 33.103, RSMo, was controlling, in that said statute specifically set out the purposes for which deductions may be made, and the United Community Fund was not included.

Also, in Opinion Letter No. 158, March 25, 1965, Hearnes, we held that absent a statute granting the authority to do so, municipal earnings taxes could not be withheld from the wages of state employees.

Accordingly, it is our opinion that the Office of Administration cannot make any deduction which is not specifically provided for by statute.

Mr. Robert L. James

Since Section 33.103 specifically provides only for deduction for the purchase of shares in the "Missouri State Employees' Credit Union" and for no other, and there are no other statutes that we are aware of allowing deductions for any other credit union, it is the further opinion of this office that the Office of Administration cannot deduct from an employee's compensation an amount for the purchase of credit union shares for any credit union other than the "Missouri State Employees' Credit Union."

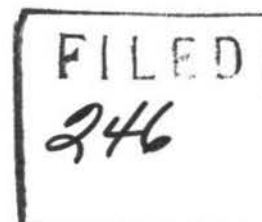
Yours very truly,

JOHN C. DANFORTH
Attorney General

June 26, 1974

OPINION LETTER NO. 246
Answer by letter-Nowotny

Honorable Christopher S. Bond
Governor of Missouri
Executive Suite
State Capitol Building
Jefferson City, Missouri 65101



Dear Governor Bond:

This is in reply to your request for an opinion concerning the question of whether action must be taken concerning "unencumbered appropriation balances" pursuant to Section 1.7(2) of Senate Bill No. 1, First Extraordinary Session, 77th General Assembly, in order to process the necessary paperwork to make payments for expenses incurred prior to July 1, 1974. Your question is predicated upon the example of an employee of an existing agency who incurs travel expenses while on official business of that agency prior to the effective date of transfer of that agency to a new department under state reorganization, but who is unable to submit his expense account until after the effective date of transfer of that agency to a new department.

The appropriate language of Section 1.7(2) of the "Omnibus State Reorganization Act of 1974" (Senate Bill No. 1) provides as follows:

" . . . Unencumbered appropriation balances in whole or in part may be transferred on approval of the governor and the state fiscal affairs committee. . . ."

In determining this question and the meaning of this quoted language, it is also important to know when the transfers are going to take place. We are advised that the transfers involved will take place no sooner than June 28 and no later than June 30. We are also advised that the new departments, although coming

Honorable Christopher S. Bond

into existence one or two days before July 1, 1974, will not basically need funds until the new fiscal year starts on July 1, 1974. The importance of this, of course, is that the appropriation bills just passed are for the period of July 1, 1974, through June 30, 1975, and are appropriations to the new departments as provided for in state reorganization.

However, the present appropriations are to the presently existing agencies and departments for the period of July 1, 1973, through June 30, 1974. Therefore, if a new department under state reorganization was to come into existence for some considerable length of time prior to July 1, 1974, that new department would then not have any appropriations until July 1, 1974, under which it could operate. The obvious purpose, therefore, of the provision quoted above is to allow the balances that are unencumbered by the old departments and agencies to be transferred to the new departments for their use during this fiscal year of July 1, 1973, through June 30, 1974.

Note, however, that the only thing that is allowed for transfer is "unencumbered balances," which, of course, means those sums for which obligations have not been incurred by the existing agency on those appropriations. In answer to your question, therefore, it is quite apparent that the expenses incurred in your example would constitute obligations on the appropriations of the old agency prior to the date of transfer. Therefore, those would be moneys that would not be "unencumbered" and therefore could not be transferred.

It would be our view that it would not be necessary to transfer "unencumbered appropriation balances" in order to allow these expenses to be paid. In fact, it would not have any bearing on that question. We add that, unless it is expected that the new departments will incur obligations in the last day or two of June, there would not appear to be any reason to transfer the "unencumbered appropriation balances." The only purpose, as we stated, for this provision was in case the new department came into existence at some appreciable time prior to July 1, 1974.

Having determined the above question, you then ask how the necessary paperwork should be processed. In other words, prior to state reorganization, the existing agency would initiate and sign vouchers to be presented to the Comptroller, but now, those agencies may not exist or if they do will be in a new department, and your question is who should sign the vouchers and present them to the Comptroller. This is a practical question for there appears to be no doubt that the obligations are properly

Honorable Christopher S. Bond

incurred and should be paid. It is our view, therefore, that the new department to which an agency is transferred would prepare and sign the vouchers for presentation to the Comptroller after state reorganization has been accomplished. For this purpose, the new department is in effect a caretaker of the business of the old agencies and has been given the authority to carry on the business of the old agencies.

Yours very truly,

JOHN C. DANFORTH
Attorney General



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

July 11, 1974

OPINION LETTER NO. 247

Honorable William L. Mauck
Prosecuting Attorney
Dallas County
Buffalo, Missouri 65622

Dear Mr. Mauck:

This letter is in response to your question asking:

"Does RSMo. 120.400 require the County Clerk to make publication concerning the conduct of a primary election, as required by RSMo. 120.390, in both of the only two newspapers in the County, when only one of the newspapers is a legal newspaper, as defined by RSMo. 493.050, or does RSMo. 120.400 require the County Clerk to publish the necessary notices in only legal newspapers, as defined by RSMo. 493.050?"

You also state that:

"The situation in Dallas County is that there are two newspapers, only one of which is a legal newspaper, as defined by the statutes. The problem the County Clerk has is whether to publish the required primary election notices in both newspapers or in only the legal newspaper."

Section 120.390, RSMo, provides:

"Each of the county clerks or boards of election commissioners shall, upon receipt

Honorable William L. Mauck

of the list from the secretary of state publish, under the proper party designation, the title of each office and the names and addresses of all persons who have filed declaration papers therefor, giving the name and address of each, the date of the primary election, the hours during which the polls will be open and that the primary will be held at the regular polling places in each precinct. The notice shall be published once in each of the two weeks immediately preceding the election as provided by section 120.400."

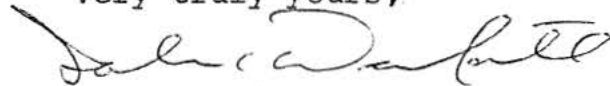
Section 120.400, RSMo, provides:

"Every publication required in connection with the conduct of a primary election shall be made in two newspapers which are published within the county, each of which represents one of the two major political parties, if there are two such newspapers, and if not, then in any two newspapers published within the county, or if there is only one newspaper published within the county then in that newspaper, or if there is no newspaper published within the county then in some newspaper having general circulation within the county."

Section 493.050, RSMo, sets out the requirements for a "legal" newspaper for the publication of public advertisements and orders of publication.

Section 120.400 does not purport to define "newspaper" and it is our view that such can only be properly defined by reference to Section 493.050. Therefore, the answer to your question is that Section 120.400 refers to only newspapers coming within the provisions of Section 493.050.

Very truly yours,

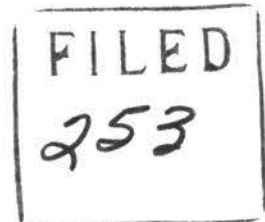


JOHN C. DANFORTH
Attorney General

October 31, 1974

OPINION LETTER NO. 253
Answer by letter-McBride

Honorable A. J. Seier
Prosecuting Attorney
Cape Girardeau County
721 North Sunset
Cape Girardeau, Missouri 63701



Dear Mr. Seier:

This opinion is in response to your request as follows:

"Under Senate Bill 417 passed by the 77th General Assembly, the Workmen's Compensation Law was amended as follows:

"RSMo. 287.020. 1. The word 'employee' as used in this chapter shall be construed to mean every person in the service of any employer, as defined in this chapter, under any contract of hire, express or implied, oral or written, or under any appointment or election, including executive officers of corporations. . ."

"RSMo. 287.030. 1. The word 'employer' as used in this chapter shall be construed to mean: . . .
(2) The state, county, municipal corporation, township, school or road, drainage, swamp and levee districts, or school boards, board of education, regents, curators, managers or control commission, board or any other political subdivision, corporation or

Honorable A. J. Seier

quasi corporation, or cities under special charter, or under the commission form of government."

"Under the terms of this act, would elected county officials such as County Judges, Sheriff, County Clerk, Circuit Clerk, Court of Common Pleas Clerk, Prosecuting Attorney, Coroner, etc. be considered employees under this Act?"

In an opinion of this office on February 7, 1950 (copy enclosed), it was stated that "Elective officers of a county are not employees of the county and are not covered by the Workmen's Compensation Act if such act is accepted by the county. . . ." That statement was based on a construction of the definition of the word "employee" then defined in Section 3695(a), RSMo 1939, as follows:

"The word 'employee' as used in this chapter shall be construed to mean every person in the service of any employer, as defined in this chapter, under any contract of hire, express or implied, oral or written, or under any appointment or election, . . ."

It is noted that this definition was the same then as now, except that it did not then contain the phrase "including executive officers of corporations."

It was then considered that the words "in the service of any employer" required the relationship of master and servant before a person would be considered an employee.

Persons in several position categories who did not satisfy the necessary relationship for inclusion in the definition of the term "employee," quoted above, were brought under the Workmen's Compensation Act by specific legislation. In 1967, the 74th General Assembly of Missouri caused executive officers of corporations to become employees by adding the phrase "including executive officers of corporations" at the end of the first sentence in the definition of the word "employee," Section 287.020, RSMo. The 75th General Assembly of Missouri (1969) provided workmen's compensation coverage for state employees not already under the provisions of the Act, and in so doing, defined state employees as follows:

Honorable A. J. Seier

"As used in sections 105.800 to 105.850, the term 'state employee' means any person who is an elected or appointed official of the state of Missouri or who is employed by the state and earns a salary or wage in a position normally requiring the actual performance by him of duties on behalf of the state." Section 105.800, RSMo 1969

In 1973, Section 287.021 was enacted requiring each county to provide workmen's compensation insurance to cover all sheriffs and deputy sheriffs in its county. In connection therewith it was provided:

"1. As used in this chapter, the term 'employee' includes a sheriff or deputy sheriff and the term 'employer' includes a county in regard to a sheriff or deputy sheriff."

The preceding paragraph shows how the legislature enacted specific legislation in three instances to avoid the controllable service test for determining whether persons were employees for workmen's compensation purposes. The 77th General Assembly (1974) brought employments by a county, municipal corporation, township, school or road, drainage, swamp and levee district, or school board, board of education, or any other political subdivision within the Workmen's Compensation Act by removing these employments from those exempted from the operation of the Act, Section 287.090, RSMo. It did not change the definition of the word "employee" nor did it enact any specific legislation that would remove the controllable service test for determining whether or not persons are employees. It may be logically inferred that if the legislature had intended to include elected county officials in the class of persons brought within the Act, it would have done so by specific legislation as prior legislatures had done with respect to executive officers of corporation, elected state officials, and county sheriffs and deputy sheriffs.

Other than the new section, 287.021, in 1973 bringing county sheriffs under the Workmen's Compensation Law, there has been no legislation that affects the February 7, 1950, opinion of this office or the soundness of that opinion. Therefore, that opinion continues in effect but is not applicable to sheriffs who have been specifically brought under the

Honorable A. J. Seier

Workmen's Compensation Act by Section 287.021; and it is the opinion of this office that elected county officials, except sheriffs, are not employees of the county for the purposes of the Workmen's Compensation Act.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 33
2-7-50, Givens

OPINION CHECK SHEET

OP. NO. 253

PRI. _____

Requested By: A. J. Lewis

Request Received On 6-21-74

Assigned On 6-28-74

Assigned To Mr. Brude

On _____

Preliminary Conference Held On _____

Review Draft: Target Date _____ Completed _____

Assigned For Review To Klopperbach On 8-14-74

Review: Target Date _____ Completed _____

To Opinion Chief For Review On _____ Completed _____

Revisions:

To Attorney General For Approval On _____

[] Approved [] Revision Date _____

[] Index and Digest Drafted

Returned To Writer For Issue Draft On _____

This Opinion Ready For Attorney General's Signature

Date _____ s/ _____
Opinion Chief

Date of Issue _____

For Opinion Clerk:

_____ Indexed
_____ Digest
_____ Copies Mailed

Permanent File Contents Reviewed by
Opinion Chief.

All Procedures Completed

Date _____ s/ _____
Opinion Chief



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

September 16, 1974

OPINION LETTER NO. 254

Honorable Donald L. Manford
State Senator, 8th District
9409 Oakland
Kansas City, Missouri 64138

Dear Senator Manford:

This letter is in response to your opinion request asking:

"(1) Can county and/or city, town or village ordinances in any manner further restrict the requirements of zoning of mobile homes since House Bill 98 has been enacted into law?

"(2) Facts - Mobile home parks - Can any county and/or city, town or village of the state further restrict zoning requirements or do they prevail over House Bill 98? Mobile home parks in Jackson County are having these questions come to light because of county zoning ordinances."

The legislation to which you refer is now Sections 700.010 through 700.085, RSMo Supp. 1973.

It is clear from the title of the Act and from the substance of its provisions that the Act applies to "[E]stablishing uniform standards for mobile homes and recreational vehicles providing for inspection and fees, with penalty provisions."

Honorable Donald L. Manford

The only restriction in the Act on political subdivisions' regulations is found in Section 700.035 which provides:

"If a mobile home or recreational vehicle carries a seal as provided in sections 700.010 to 700.085, no agency of this state, nor any municipality or other local governmental body shall require such mobile home or recreational vehicle to comply with any other building, plumbing, heating or electrical code other than the code established by sections 700.010 to 700.085."

Clearly the Act purports to provide only that insofar as mobile homes or recreational vehicles carrying a seal are concerned no state agency, municipality or other local government shall require compliance with the building, plumbing, heating or electrical code other than the code established by Sections 700.010 to 700.085 and does not purport to restrict the zoning powers of political subdivisions as such.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

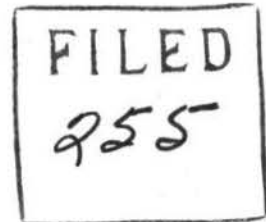


JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

July 31, 1974

OPINION LETTER NO. 255



Mr. Jack K. Smith, Executive Secretary
Missouri Clean Water Commission
1014 Madison Street
Jefferson City, Missouri 65101

Dear Mr. Smith:

This official opinion is issued in response to your request addressed to this office. Your request reads as follows:

"Does Missouri law meet the requirements of the Federal Water Pollution Control Act Amendments of 1972 for the NPDES state permit program as outlined in the attached letter from the U.S. Environmental Protection Agency? Specific responses to the questions posed therein are requested in your opinion."

We understand that the letter referred to in your request poses a number of questions, arranged in eleven categories which require a response. The answers to these questions will provide the answer to your question per your request. Therefore, we will answer these eleven categories of questions, in the format suggested by the United States Environmental Protection Agency.

After the passage of the Federal Water Pollution Control Act Amendments of 1972, the State of Missouri amended its Clean Water Law with the passage of Senate Bill 321, Seventy-Seventh Legislature, effective on July 23, 1973. Therefore, citation to Missouri statutes herein are to the Revised Statutes of Missouri, Supplement 1973, unless otherwise indicated. Citations to relevant Federal statutes herein have been supplied by the Environmental Protection Agency as shown in brackets following each question.

The questions posed by the letter attached to your request, with answers in the format suggested by the Environmental Protection Agency, are as follows:

1. Authority to Issue Permits

a. Existing and new point sources.

Does Missouri law provide authority to issue permits for the control of discharge of pollutants by existing and new point sources to the same extent as is required under the permit program administered by the U.S. Environmental Protection Agency (hereinafter "EPA") pursuant to Section 402 of the Federal Water Pollution Control Act, as amended, 33 U.S. C.A. §1251, et seq?

[Relevant provisions in and pursuant to the Federal Water Pollution Control Act Amendments of 1972 (hereinafter "FWPCA") include §§301(a) and 402(a)(1) of that act, and 40 C.F.R. §124]

It is our opinion that Missouri law does provide such authority, which is found in Sections 204.016, 204.026(13) and 204.051 of the Missouri Clean Water Law.

Section 204.016(6) defines "point source" as:

". . . any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged;"

Section 204.016(12) defines "water contaminant" as:

". . . any particulate matter or solid matter or liquid or any gas or vapor or any combination thereof, or any temperature change which is in or enters any waters of the state either directly or indirectly by surface runoff, by sewer, by subsurface seepage or otherwise, which causes or would cause pollution upon entering waters of the state, or which violates or exceeds any of the standards, regulations or limitations set forth in sections 204.006 to 204.141 or any federal water pollution control act, or is included in the definition of pollutant in such federal act."

The definition of "point source" found in Section 204.016(6) above is identical to the definition of "point source" found in Section 502(14) of the FWPCA. And the definition of "water contaminant" as used in the Missouri Clean Water Law includes any "pollutant" under the FWPCA. Therefore, when the term "water contaminant" is used in the Missouri Clean Water Law, it also refers to any "pollutant" under the FWPCA.

Section 204.026(13) provides that the Missouri Clean Water Commission (hereinafter "Commission") shall:

"Issue, continue in effect, revoke, modify or deny, under such conditions as it may prescribe, to prevent, control or abate pollution or any violations of sections 204.006 to 204.141 or any federal water pollution control act, permits

for the discharge of water contaminants into the waters of this state, and for the installation, modification or operation of treatment facilities, sewer systems or any parts thereof. Such permit conditions, in addition to all other requirements of this subdivision, shall insure compliance with all effluent regulations or limitations, water quality related effluent limitations, national standards of performance and toxic and pretreatment effluent standards, and all requirements and time schedules thereunder as established by sections 204.006 to 204.141 and any federal water pollution control act; however, no permit shall be required of any person for any emission into publicly owned treatment facilities or into publicly owned sewer systems tributary to publicly owned treatment works."

We read this section to require that permits for the discharge of water contaminants or for the installation, modification or operation of treatment facilities and sewer systems can be issued only when the activity is in, or on such conditions as will insure, compliance with all applicable federal standards and regulations.

Section 204.051(2) provides it shall be unlawful to build, erect, alter, replace, operate, use or maintain any point source unless a permit is issued therefor. Section 204.051(3) requires that every existing or proposed point source which will be subject to any federal water pollution control act, or regulation thereunder must apply for a permit. Section 204.051(5) provides that the permit shall be granted or denied within 60 days "after all requirements of the Federal Water Pollution Control Act concerning the issuance of permits have been satisfied", unless the applicant does not require a permit under the FWPCA.

Section 204.016(15) defines "waters of the state" to include:

". . . all rivers, streams, lakes and other bodies of surface and subsurface water lying within or forming a part of the boundaries of the state which are not entirely confined and located completely upon lands owned, leased or otherwise controlled by a single person or by two or more persons jointly or as tenants in common and includes waters of the United States lying within the state."

As this definition includes waters of the United States lying within the state, "waters of the state" include "navigable waters" as defined by Section 502(7) of the FWPCA. Therefore, the coverage of the Missouri Clean Water Law, with regard to specific bodies of water, is at least as extensive as the coverage by the FWPCA.

It is our opinion that the above cited sections of the Missouri Clean Water Law require the issuance of a permit before any point source can discharge water contaminants into the waters of this state, and further require that permits be issued only after compliance with the Federal Water Pollution Control Act. Therefore, state law does provide the authority to issue permits for the control of discharge of pollutants by existing and new point sources to the same extent as required under the permit program administered by the EPA pursuant to Section 402 of the FWPCA, as amended.

b. Disposal into wells

Does state law provide authority to control the disposal of pollutants into wells?

[Relevant provisions in and pursuant to the FWPCA are in §402(b)(1)(D) of that act and 40 C.F.R. §124.80]

The authority to control the disposal of pollutants into wells is found in Sections 204.016 and 204.051 of the Missouri Clean Water Law and Section 564.025, RSMo. Suppl. 1973.

As discussed in subparagraph "a." above, Section 204.051 requires a permit for the use, operation, maintenance, construction or alternation of any new or existing point source, and that permit must conform to the requirements of the FWPCA. Section 204.016(6) defines "point source" to include any "well . . . from which pollutants are or may be discharged." Section 204.016(1) defines "discharge" as "the causing or permitting of one or more water contaminants to enter waters of the state." "Water contaminant" is defined by Section 204.16(12), as set out in subparagraph "a." above, to include any matter, or temperature change, or other pollutant "which is in or enters any waters of the state either directly or indirectly by . . . subsurface seepage or otherwise. . . ." Section 204.016(15) defines "waters of the state" to include "subsurface water".

We read the above cited statutes to prohibit the discharge of pollutants into wells without a permit therefor, which permit must comply with state and federal standards and conditions. This is so for two reasons. First, discharge of a pollutant into a well would constitute the maintenance of a water contaminant or point source, for which Section 204.051.2 requires a permit. Second, it would constitute a violation of Section 204.051.1(1), which makes it unlawful:

". . . to place or cause or permit be placed any water contaminant in a location where it is reasonably certain to cause pollution of any water of the state."

Furthermore, the discharge of certain matter into wells is absolutely prohibited under any circumstance. Section 564.025, RSMo. Suppl. 1973 provides:

- "1. No person, firm, corporation or political subdivision shall construct or use any waste disposal well located in this state.
2. As used in this section, "waste disposal well" shall mean any subsurface void porous formation or cavity, natural or artificial, used for the disposal of liquid or semiaqueous waste except as excluded in subsection 3 of this section.
3. "Waste disposal well" shall not include:
 - (1) Sanitary landfills or surface mining pits used for the disposal of nonputrescible solid wastes as defined in section 64.460, RSMo 1969;
 - (2) Cesspools used solely for disposal of waste from private residences;
 - (3) Septic tanks used solely for disposal of waste.

Therefore, under this statute no liquid or semiaqueous waste may be discharged into a well. Thus, it is our opinion that Missouri law provides adequate authority to control the disposal of pollutants into wells.

2. Authority to Apply Federal Standards and Requirements.

a. Effluent standards and limitations and water quality standards.

Does state law provide authority to issue permits which may include conditions written to enforce provisions at least as stringent as those found in the following applicable Federal effluent standards and limitations and water quality standards promulgated or effective under the FWPCA:

- (1) Effluent limitations pursuant to Section 301;
- (2) Water quality related effluent limitations pursuant to Section 302;
- (3) National standards of performance pursuant to Section 306;
- (4) Toxic and pretreatment effluent standards pursuant to Section 307?

[Relevant FWPCA provisions include §§301(b), 301(e), 302, 303, 304(d), 304(f), 305, 307, 402(b)(1)(A), 208(e), and 510 and 40 C.F.R. §124.42.]

The authority referred to in the above question is found in Sections 204.026(13) and (16) and 204.051, Missouri Clean Water Law. Section 204.026(13) provides that the Clean Water Commission shall issue permits under such conditions as it may prescribe, to prevent, control or abate pollution, violations of the Missouri Clean Water Law or any federal water pollution control act. This section further provides that:

"Such permit conditions, in addition to all other requirements of this subdivision, shall insure compliance with all effluent regulations or limitations, water quality related effluent limitations, national standards of performance and toxic

and pretreatment effluent standards, and all requirements and time schedules thereunder as established by sections 204.006 to 204.141 and any federal water pollution control act." Section 204.026(13).

It is our opinion that Section 204.026(13) requires the Commission to issue its permits under such conditions as will insure compliance with applicable effluent limitations, water quality related effluent limitations, national standards of performance, and toxic and pretreatment effluent standards pursuant to Sections 301, 302, 306 and 307 of the FWPCA.

Moreover, Section 204.051.3, which applies to both new and existing point sources, provides that permits shall be issued upon such conditions as are deemed "necessary to insure that the source will meet the requirements of . . . any federal water pollution control act as it applies to this state." We read the quoted language to reaffirm the command of Section 204.026(13) that all permits be issued upon such conditions as are necessary to insure compliance with the standards established by or pursuant to the FWPCA.

It should be noted at this point that Section 204.051.3 contains no language which would make a distinction between permit requirements for publicly owned treatment works and other point sources. In this regard, the definition of "person" found in Section 204.016(5) includes any public corporation, political subdivision, or any agency, board, department or bureau of the

state or federal government. Section 204.051.1(3) makes it unlawful for any "person":

"To violate any pretreatment and toxic material control regulations, or to discharge any water contaminants into any waters of the state which exceed effluent regulations or permit provisions as established by the commission or required by any federal water pollution control act."

It is our opinion that the cited statutes make the permit requirements (including conditions) equally applicable to publicly owned treatment works as well as to other point sources.

In addition to the requirement in Sections 204.026(13) and 204.051.3 that permits be issued upon such conditions as are necessary to insure compliance with federal standards, Section 204.026(16) provides that the Commission shall:

"Establish effluent and pretreatment and toxic material control regulations to further the purpose of sections 204.006 to 204.141 and as required to insure compliance with all effluent limitations, water quality related effluent limitations, national standards of performance and toxic and pretreatment effluent standards, and all requirements and any time schedules thereunder, as established by any federal water pollution control act for point sources in this state. . . ."

Although we read Section 204.026(16) to give the Commission full authority to promulgate standards at least as stringent as federal regulations for effluent limitations, water quality related effluent limitations, national standards of performance, and toxic and pretreatment effluent standards, we do not believe that it is necessary for the Commission to promulgate such standards before

enforcing applicable federal standards and limitations through the permit system. Because Section 204.026(13) provides that the Commission may issue permits "under such conditions as it may prescribe," it is our opinion that the Commission has the authority to apply the above-mentioned federal standards (through the permit system) without first promulgating or adopting those standards as part of the regulations of the Commission.

It should be noted that even though a permit is not required for emissions into any publicly owned treatment works, or sewer system tributary thereto, Section 204.051.2, the Commission does have the authority to directly enforce against industrial users of publicly owned treatment works, pretreatment effluent standards at least as stringent as are required by the FWPCA. As was discussed above, Section 204.026(16) requires the Commission to establish pretreatment control regulations as required to insure compliance with all pretreatment effluent standards established by the FWPCA. Section 204.051.1(3) makes it unlawful to violate any pretreatment regulations established by the Commission or required by the FWPCA. Therefore, federal pretreatment effluent standards are directly enforceable, through Section 204.026(16), by the Commission.

Section 208 of the FWPCA prohibits the issuance of a permit for any point source which is in conflict with an approved area wide plan. Therefore, it is necessary, in order to obtain approval of the Missouri permit program under Section 402(b) of the FWPCA, that the Missouri Clean Water Law provide the authority to issue permits under conditions specified in such an area wide plan. It

is our opinion that because Section 204.026(13) requires permits to insure compliance with any federal water pollution control act, the Commission has the authority to issue permits upon conditions which insure compliance with an area wide plan adopted pursuant to Section 208(b) of the FWPCA.

We understand question "2.a." to originally have included an inquiry as to enforcement by the state permit system of federal ocean discharge criteria pursuant to Section 403 of the FWPCA. As Missouri does not border any ocean or sea, the Missouri Clean Water Law does not provide for the promulgation or enforcement of ocean discharge criteria, and it was unnecessary to discuss the promulgation or enforcement of standards pursuant to such criteria.

b. Effluent limitation requirements of Section 301 and 307.

In the absence of formally promulgated effluent standards and limitations under Sections 301(b) and 307 of the FWPCA, does Missouri law provide authority to issue permits with conditions which would achieve the purpose of FWPCA Sections 301(b) and 307 by:

- (1) Applying effluent limitations to existing point sources, other than publicly owned treatment works, which would be based on application of the best practicable control technology currently available or the best available technology economically achievable;
- (2) Applying effluent limitations to publicly owned treatment works, which would be based upon the application of secondary treatment or the best practicable waste treatment technology; and
- (3) Applying effluent limitations to any point source which would be written to control or if necessary, prohibit the discharge of toxic pollutants in toxic amounts, or to require pre-treatment of pollutants which interfere with, pass through, or otherwise are incompatible with the operation of publicly owned treatment works?

[Relevant FWPCA provisions are found in Sections 301, 304(d), 307, 402(a)(1), 402(b)(1)(A) and 40 C.F.R. §124.42(a)(6).]

We understand this question to be directed to the situation where there are no federally promulgated effluent standards and limitations (pursuant to Sections 301(b) and 307 of the FWPCA) for a particular point source, yet such point source is discharging pollutants into the waters of this state. We understand the question to ask whether in the absence of such standards and limitations which would be enforced by the Commission through Sections 204.026(13) or (16) and Section 204.051.3 (as discussed in paragraph 2.a., above) the Commission has the authority to issue permits upon conditions which nevertheless achieve the purpose of Sections 301 and 307 of the FWPCA. The necessary authority is found in Sections 204.026(13) and 204.051.3 of the Missouri Clean Water Law.

Section 204.026(13) provides, inter alia, that the Commission shall, with respect to permits:

"Issue, continue in effect, revoke, modify or deny, under such conditions as it may prescribe, to prevent, control or abate. . . any violations of . . . any federal water pollution control act. . ."

Section 204.051.3 provides, inter alia, that the executive secretary of the Commission shall:

"issue a permit with such conditions as he deems necessary to insure that the source will meet the requirements of . . . any federal water pollution control act as it applies to sources in this state."

We read these statutes to mean that the Commission has the authority to issue permits upon any and all conditions as are necessary to meet the requirements of, prevent violation of, and achieve the purposes of, any federal water pollution control act.

Specifically, it is our opinion that Sections 204.026(13) and 204.051.3 provide the authority for the Commission to issue permits upon such condition as would achieve the purposes of FWPCA Section 301(b) and 307 by:

- (1) Applying effluent limitations to existing point sources, other than publicly owned treatment works, which would be based on application of the best practicable control technology currently available or the best available technology economically achievable;
- (2) Applying effluent limitations to publicly owned treatment works, which would be based upon the application of secondary treatment or the best practicable waste treatment technology; and
- (3) Applying effluent limitations to any point source which would be written to control or if necessary prohibit the discharge of toxic pollutants in toxic amounts, or to require pretreatment of pollutants which interfere with, pass through, or otherwise are incompatible with the operation of publicly owned treatment works.

c. Schedules of compliance

Does state law provide authority to set and revise schedules of compliance in issued permits which would require the achievement of applicable effluent standards and limitations or, in the absence of a schedule of compliance contained therein, within the shortest reasonable time, consistent with the requirements of the FWPCA? Is there a requirement that the Clean Water Commission show a violation of effluent limitations or water quality standards before it can enforce compliance dates, interim or final?

[Relevant FWPCA provisions include Sections 301(b), 303(e), 304(b), 306, 307, 402(b)(1)(A), 401(11), 502(17) and 40 C.F.R. §§124.44 and 124.72]

The authority referred to in the first question above is found in Sections 204.026(13) and 205.051.3 of the Missouri Clean Water Law. Section 204.026(13) provides, inter alia, that the Commission shall:

"Issue, continue in effect, revoke, modify or deny, under such conditions as it may prescribe, to prevent, control or abate. . . any violations of . . . any federal water pollution control acts, permits. . . Such permit conditions . . . shall insure compliance with all [standards and limitations discussed in 2a above], and all requirements and time schedules thereunder as established by . . . any federal water pollution control act." [emphasis added]

Section 204.051.3 provides that the executive secretary of the Commission:

"shall issue a permit with such conditions as he deems necessary to insure that the source will meet the requirements of . . . any federal water pollution control act as it applies to this state."

We read the above-quoted statutes to require that any permit issued contain such conditions as are necessary to insure compliance with the FWPCA. Section 204.026(13) specifically mentions "time schedules" established by any federal water pollution control act as being a necessary part of the conditions of a permit. Therefore, Section 204.026(13) requires that any schedule of compliance necessary to insure compliance with the FWPCA be made part of the conditions of the permit, including interim compliance dates where necessary. Section 204.026(13) also authorizes the Commission to modify any permit to achieve the purpose

specified. Therefore, the Commission has the authority to revise a schedule of compliance to insure compliance with applicable effluent standards and limitations.

With regard to the situation where an applicable effluent standard or limitation contains no schedule of compliance, Section 204.051.3 would require the executive secretary to issue a permit upon such conditions as will insure that the applicable requirements of any federal water pollution control act are met. Therefore, if the FWPCA requires, in the absence of a schedule of compliance, that the permit insure compliance with effluent standards and limitations within the shortest reasonable time consistent with the requirements of the FWPCA, as 40 C.F.R. §124.44 (a) (2) suggests, then the Commission can issue the permit upon conditions which will achieve such compliance. It is our opinion that Sections 204.026(13) and 204.051.3 provide authority to set and revise schedules of compliance in issued permits which would require the achievement of applicable effluent standards and limitations or, in the absence of a schedule of compliance contained therein, within the shortest reasonable time consistent with the requirements of the FWPCA.

In answer to the second question above, it is our opinion that Sections 204.051.1(3) and 204.076.1 of the Missouri Clean Water Law provide for the enforcement of a compliance date, interim or final, without the necessity of first showing a violation of effluent limitations or water quality standards.

3. Authority to Deny Permits in Certain Cases

Does the Missouri law preclude issuance of permits which would:

- a. Authorize the discharge of radiological, chemical, or biological warfare agent or high-level radioactive waste;
- b. In the judgment of the Secretary of the Army acting through the Chief of Engineers, result in the substantial impairment of anchorage and navigation of waters of the United States;
- c. Be objected to in writing by the Administrator of EPA, or his designee, pursuant to any right to object provided to the Administrator under Section 402(d) of the FWPCA; or
- d. Authorize a discharge from a point source which is in conflict with a plan approved under Section 208(b) of the FWPCA?

[Relevant FWPCA provisions include Sections 301(f), 402(b)(6), 402(d)(2), and 208(e); 40 C.F.R. §§124.41 and 124.46].

The statutory language which precludes the types of permits referred to in the above question is found in Sections 204.026(17), 204.051.1(4), 204.051.3, and 204.051.9 of the Missouri Clean Water Law.

Section 204.026(17) provides that the Commission shall:

"Prohibit all discharges of radiological, chemical, or biological warfare agent or high-level radiological waste into waters of this state."

Section 204.051.1(4) makes it unlawful to do those things prohibited by Section 204.026(17). These two statutes absolutely prohibit the activity referred to in subparagraph "a." above.

Section 204.051.9 provides that:

"In any event, no permit hereunder shall be issued if properly objected to by the federal government or any agency authorized to object under any federal water pollution control act. . . ."

We read this statute to prohibit the Commission from issuing a permit in those instances where the FWPCA provides that a permit shall not issue upon the proper objection of a federal official. Therefore, in those instances described in subparagraphs "b." and "c." above, where a federal official is given the authority by the FWPCA to object to the issuance of a permit, such an objection would result in the denial of a permit by the Commission.

Section 204.051.1(3) provides that it is unlawful:

". . . to discharge any water contaminants into any waters of the state which exceed effluent regulations or permit provisions as established by the commission or required by any federal water pollution control act."

Section 204.051.3 provides, inter alia, that the executive secretary of the Commission shall issue a permit under such conditions as will insure compliance with the Missouri Clean Water Law and the FWPCA. The section then continues:

"If the executive secretary determines that the source does not meet or will not meet the requirements of either act and the regulations pursuant thereto, he shall deny the permit under the applicable act. . . ."

We read the last two quoted sections as prohibiting any discharge which would be in conflict with the FWPCA and regulations pursuant to the FWPCA. A plan promulgated pursuant to Section 208 of the FWPCA would be included among the requirements of the act and such regulations, and the activity described in subparagraph

"d." above could not be authorized by the Commission.

Moreover, as was discussed in paragraph "2.a.", supra, Section 204.026(13) requires permits to be issued under such conditions as will insure compliance with the FWPCA. Therefore, a permit could not be issued pursuant to Section 204.026 if such permit would conflict with an area wide plan and thus violate Section 208(e) of the FWPCA.

4. Authority to Limit Duration of Permits

Does the Missouri law limit the duration of permits thereunder to a fixed term not exceeding five years?

[Relevant FWPCA provisions include Section 402(b)(1)(B); 40 C.F.R. §124.5.]

Section 204.051.10 of the Missouri Clean Water Law provides that "[o]perating permits shall be issued for a period not to exceed five years after date of issuance. . . ." Therefore, any permit for the discharge of water contaminants issued under the Missouri permit system would be issued for a fixed term not to exceed five years.

5. Authority to Apply Recording, Reporting, Monitoring, Entry, Inspection and Sampling Requirement.

Does Missouri law provide authority to:

- a. Require any permit holder or industrial user of a publicly owned treatment works to:

(1) Install, calibrate, use and maintain monitoring equipment or methods and take samples of effluents as required by the Missouri Clean Water Commission and establish and maintain specified records and make reports, and

(2) Provide such other information as may reasonably be requested by the Commission?

b. Enable an authorized representative of the State, upon presentation of such credentials as are necessary, to:

(1) Have a right of entry to, upon, or through any premises of a permittee or of an industrial user of a publicly owned treatment works in which premises an effluent source is located or in which any records are required to be maintained;

(2) At reasonable times have access to and copy any records required to be maintained;

(3) Inspect any monitoring equipment or method which is required; and

(4) Have access to and sample any discharge of pollutants to State waters or to publicly owned treatment works resulting from the activities or operations of the permittee or industrial user?

[Relevant FWPCA provisions include Sections 304(h)(2)(A) and (B), 308(a), 402(b), and 402(b)(9); 40 C.F.R. §§ 124.45(c), 124.61-63, and 124.73(d).]

The required authority is found in Sections 204.026(20), 204.026(23), 204.051.3 and 204.051.5 of the Missouri Clean Water Law. Section 204.026(23) provides that the Commission shall:

"Require persons owning or engaged in operations which do or could discharge water contaminants, or introduce water contaminants or pollutants of a quality and quantity to be established by the commission, into any publicly owned treatment works or facility, to provide and maintain any facilities and conduct any tests and monitoring necessary to establish and maintain records and to file reports containing information relating to measures to prevent, lessen or render any discharge less harmful or relating to rate, period, composition, temperature, and quality

and quantity of the effluent, and any other information required by any federal water pollution control act or the executive secretary hereunder, and to make them public, except as provided in subdivision (20) of this section. The commission shall develop and adopt such procedures for inspection, investigation, testing, sampling, monitoring and entry respecting water contaminant and point sources as may be required for approval of such a program under any federal water pollution control act."

In this same regard, Section 204.051.5 provides that:

"The executive secretary or the commission may require the applicant to provide and maintain such facilities or to conduct such tests and monitor effluents as necessary to determine the nature, extent, quantity or degree of water contaminant discharged or released from the source, establish and maintain records and make reports regarding such determination."

We read Sections 204.026(23) and 204.051.5 as providing all the authority necessary to require any permit holder or industrial user of a publicly owned treatment works to do those things mentioned in paragraph "5.a." above.

Section 204.026(20) provides that the Commission shall:

"Develop such facts and make such investigations as are consistent with the purposes of sections 204.006 to 204.141, and, in connection therewith, to enter or authorize any representative of the commission to enter at all reasonable times and upon reasonable notice in or upon any private or public property for any purpose required by any federal water pollution control act or sections 204.006 to 204.141 for the purpose of developing rules, regulations, limitations, standards, or permit conditions, or inspecting or investigating any records required to be kept by sections 204.006 to 204.141 or any permit issued hereunder,

any condition which the commission or executive secretary has probable cause to believe to be a water contaminant source or the site of any suspect violation of sections 204.006 to 204.141, regulations, standards or limitations, or permits issued hereunder. The results of any such investigation shall be reduced to writing, and shall be furnished to the owner or operator of the property. No person shall refuse entry or access, requested for the purposes of inspection under this provision, to an authorized representative in carrying out the inspection. A suitably restricted search warrant, upon a showing of probable cause in writing and upon oath, shall be issued by any judge or magistrate having jurisdiction to any representative for the purpose of enabling him to make such inspection."

In addition, Section 204.026(23) provides that:

"[t]he commission shall develop and adopt such procedures for inspection, investigation, testing, sampling, monitoring and entry respecting water contaminant and point sources as may be required for approval of such a program under any federal water pollution control act."

We read Sections 204.026(20) and 204.026(23) as providing all of the authority necessary to perform those activities mentioned in paragraph "5.b." above.

In connection with the above question, it should be noted that Sections 204.026(20) and 204.026(23) provide that the Commission shall or may require or do those things mentioned in those sections. We read the language used in those sections to empower the Commission to take direct action, by way of an appropriate regulation or order, to insure that those activities mentioned in

the above question are carried out. In addition, Section 204.051.3 requires that a permit be issued:

"with such conditions as [the executive secretary] deems necessary to insure that the source will meet the requirements of sections 204.006 to 204.141 and any federal water pollution control act as it applies to sources in this state."

We read Section 204.051.3 to empower the Commission and the executive secretary to include as a condition of a permit a requirement that the permittee do, or allow Commission employees to do, those things mentioned in the above question. Therefore, it is our opinion that the Commission may execute the above listed requirements both through the permit system and through a separate regulatory procedure.

6: Authority to Require Notice of Introductions of Pollutants into Publicly Owned Treatment Works.

Does State law provide authority to issue permits to publicly owned treatment works incorporating conditions requiring the permittees to give notice to the State permitting agency of:

- a. New introductions into such works of pollutants from any source which would be a new source as defined in Section 306 of the FWPCA if such source were discharging pollutants directly to State waters;
- b. New introductions of pollutants into such works from a source which would be a point source subject to Section 301 if it were discharging such pollutants directly to State waters; or

- c. A substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit?

[Relevant FWPCA provisions include Section 402(b) (8); 40 (C.F.R. 124.45 (d)).]

The authority to require the above-mentioned notice is found in Section 204.051.12 of the Missouri Clean Water Law. This section provides that:

"Every permit issued to municipal or any publicly owned treatment works or facility shall require the permittee to provide the clean water commission with adequate notice of any substantial new introductions of water contaminants or pollutants into such works or facility from any source for which such notice is required by sections 204.006 to 204.141 or any federal water pollution control act. Such permit shall also require the permittee to notify the clean water commission of any substantial change in volume or character of water contaminants or pollutants being introduced into its treatment works or facility by a source which was introducing water contaminants or pollutants into its works at the time of issuance of the permit. Notice must describe the quality and quantity of effluent being introduced or to be introduced into such works or facility by a source which was introducing water contaminants or pollutants into its works at the time of issuance of the permit. Notice must describe the quality and quantity of effluent being introduced or to be introduced into such works or facility and the anticipated impact of such introduction on the quality or quantity of effluent to be released from such works or facility into waters of the state."

We read Section 204.051.12 to require that any permit issued to a publicly owned treatment works include such conditions as will require such notice to the Commission as is specifically set out in

that section, or as is required by the FWPCA. As Section 402(b)(8) of the FWPCA requires notice to the permitting agency in those instances mentioned in subparagraphs "a" through "c" above, Section 204.051.12 requires that the permit issued to the publicly owned treatment works require such notice to the Commission. In addition, Section 204.051.12 specifically provides that the permit is to require notice in the situation covered by subparagraph "c" above.

It should be noted, in regard to meeting the notice requirements of the FWPCA, that Section 204.051.12 provides that the notice must describe:

" . . . the quality and quantity of effluent being introduced or to be introduced into such works or facility and the anticipated impact of such introduction on the quality or quantity of effluent to be released from such works or facility into waters of the state."

It is the opinion of this office that Section 204.051.12 provides the authority referred to in the above question and required by Section 402(b)(8) of the FWPCA.

Implicit in the effective implementation of the scheme of reporting discussed above is the ability of the permittee to obtain the necessary information regarding new introduction of pollutants, and any change in the character or volume of the flow, into the treatment works. As was discussed in paragraph 5, supra, the Commission has full authority to require testing, monitoring, record keeping and reporting by all sources, including sources introducing pollutants into a publicly owned treatment works. The Commission, pursuant to Section 204.026(23), could require that such reports include data concerning the introduction of new

pollutants and changes in the volume and character of flow into the treatment works. Sections 204.026(20) and 204.026(23) also require that such reports be made public. Therefore, reports from industrial users of the treatment works, containing the necessary information, would be available to the permittee.

In addition to the authority to require reports by industrial users of publicly owned treatment works, Commission employees are also empowered by Section 204.026(20) to enter private property to conduct, as incident to the Commission's inspection duties set out in Section 204.026(20), independent testing and monitoring of pollutant sources. The information obtained from such inspections would of course be made available to publicly owned treatment works, as it would be available to the public. It is the opinion of this office that the combination of reports required to be filed pursuant to Section 204.026(23) and inspections by the Commission pursuant to Section 204.026(20) will provide all the information necessary for publicly owned treatment works (permittees) to give the notices required by Section 402(b)(8) of the FWPCA.

7. Authority to Insure Compliance by Industrial Users with Sections 204(b), 307, and 308.

Does the State law provide authority to require that industrial users of publicly owned treatment works:

- a. Pay user charges and recovery of construction costs outlined in Section 204(b) of FWPCA;
- b. Comply with toxic pollutant effluent standards and pretreatment standards at least as stringent as those adopted pursuant to Section 307; and
- c. Comply with inspection, monitoring and entry requirements pursuant to Section 308?

[Relevant FWPCA provisions include Section 402(b)(9); 40 C.F.R. Section 124.45(e).]

The necessary authority referred to in this question is found in Section 204.026(16), (18), (20) and (23), 204.041, and 204.051.1 (3) and 204.076.1 of the Missouri Clean Water Law.

Section 204.026(18) provides that the Commission shall:

"[R]equire that all publicly owned treatment works and facilities which receive or have received grants from the state or the federal government for construction or improvement make all charges required by sections 204.006 to 204.141 or any federal water pollution control act for use and recovery of capital costs, and the operating authority for such works or facility is hereby authorized to make any such charges."

We read this section to empower the operating authority of the treatment works to set user charges and capital cost recovery charges as required by the FWPCA. The establishment of these charges would be required as a condition of the permit issued to the treatment works, pursuant to Section 204.051.3 (see paragraph "1.a.", supra, concerning compliance with and implementation of FWPCA standards in issuing state permits). We read Section 204.026(18) to provide all of the authority required by subparagraph "a" above.

With regard to subparagraph "b" above, Section 204.026(16) provides (as discussed in paragraph 2.a., supra) the authority for the Commission to promulgate pretreatment and toxic material control standards at least as stringent as those adopted pursuant to Section 307 of the FWPCA. Furthermore, Section 204.041 provides:

"As promptly as possible the commission shall adopt and promulgate reasonable effluent, pretreatment and toxic material control regulations which require the use of effective treatment facilities, or other methods to prevent water contamination, for each and every significant source, potential source, and classification of sources of water contaminants, or to limit or prevent introduction of water contaminants into publicly owned treatment works or facilities as required under any federal water pollution control act, throughout the state and thereafter may modify such regulations from time to time."

Section 204.076.1 provides that it is unlawful to discharge any water contaminant in violation of the Missouri Clean Water Law or any standard, rule or regulation promulgated by the Commission.

We read Sections 204.026(16), 204.041 and 204.076.1 as providing the authority to require that industrial users of publicly owned treatment works comply with toxic pollutant effluent standards and pretreatment standards at least as stringent as those adopted pursuant to Section 307 of the FWPCA.

With regard to the authority required by subparagraph "c" above, it is the opinion of this office that Sections 204.026(20) and 204.026(23) provide the authority to require that industrial users of publicly owned treatment works comply with inspection, monitoring and entry requirements pursuant to and at least to the same extent as required by Section 308 of the FWPCA. (See discussion in paragraphs 5 and 6, supra).

8. Authority to Issue Notices, Transmit Data, and Provide Opportunity for Public Hearings.

Does State law provide authority to comply with the following requirements of the FWPCA and EPA Guidelines for "State Program Elements Necessary for Participation in the National Pollutant Discharge Elimination System", 40 C.F.R. Part 124 (hereinafter "the Guidelines") to:

- a. Notify the public, affected States and appropriate governmental agencies of proposed actions concerning the issuance of permits;
- b. Transmit such documents and data to and from the U.S. Environmental Protection Agency and to other appropriate governmental agencies as may be required; and
- c. Provide an opportunity for public hearing, with adequate notice thereof, prior to ruling on applications for permits?

[Relevant FWPCA provisions include generally Sections 101(e) and 304(h)(2)(B), and for question 8a, Sections 402(b)(3) (public notice), 402(b)(5) (notice to affect states), 402(b)(6) (notice to Army Corps of Engineers); 40 C.F.R. §§ 124.31 (tentative permit determinations), 124.32 (public notice), 124.33 (fact sheets) and 124.34 (notice to government agencies); and for question 8(b), Sections 402(b)(4) (notices and permit applications to EPA), 402(b)(6) (notices and fact sheets to Army Corps of Engineers); 40 C.F.R. §§ 124.22 (receipt and use of Federal data), 124.23 (transmission of data to EPA), 124.34 (notice to other government agencies), 124.46 (transmission of proposed permits to EPA), 124.47 (transmission of issued permits to EPA); and for question 8c, Section 402(b)(3) (opportunity for public hearing); 40 C.F.R. §§ 124.36 (public hearings), 124.37 (notice of public hearings).]

The authority to comply with the above notice and hearing requirements is found in Sections 204.026(11) and (15), 204.051.3 and 204.051.4 of the Missouri Clean Water Law. Section 204.051.3, requiring new and existing point sources to apply for a permit, also provides:

"The executive secretary shall promptly investigate each application, which investigation shall include such hearings and notice, and consideration of such comment and recommendations as required by section 204.006 to 204.141 and any federal water pollution control act."

Section 204.051.4 further provides:

"Before issuing a permit to build or enlarge a water contaminant or point source or reissuing any permit, the executive secretary shall issue such notices, conduct such hearings, and consider such factors, comments and recommendations as required by section 204.006 to 204.141 or any federal water pollution control act."

Moreover, Section 204.026(11) provides that the Commission shall:

"[h]old such hearings, issue such notices of hearings and subpoenas requiring the attendance of such witnesses and the production of such evidence, administer such oaths, and take such testimony as the commission deems necessary or as required by any federal water pollution control act. Any of these powers may be exercised on behalf of the commission by any members thereof or a hearing officer designated by it."

And Section 204.026(15) provides that the Commission shall:

"[e]xercise all incidental powers necessary to carry out the purposes of sections 204.006 to 204.141, assure that the state of Missouri complies with any federal water pollution control act, retains maximum control thereunder and receives all desired federal grants, aid and benefits."

It will be noted that the above quoted sections empower and require the Commission to give such notice and conduct such hearings as are required by the FWPCA before issuing or denying a permit. Further, we read Section 204.026(15) to give the Commission the authority to transmit such data and documents as required by, and to such persons and governmental bodies and agencies as are required by the FWPCA. Therefore, it is the opinion

of this office that the above-cited statutes provide the authority called for in paragraph 8.

9. Authority to Provide Public Access to Information

Does State law provide authority to make the following information available to the public, consistent with the requirements of the FWPCA and the Guidelines:

- a. Except insofar as trade secrets as defined in 9b below would be disclosed, the following information:
 - (1) Any NPDES permit, permit application or form;
 - (2) Any public comments, testimony or other documentation concerning a permit application; and
 - (3) Any information obtained pursuant to any monitoring, recording, reporting, or sampling requirements or as a result of sampling or other investigatory activities of the state?
- b. Confidential information shall for purposes of this opinion request include that information (except effluent data) shown by any person to be information which, if made public, would divulge methods or processes entitled to protection as trade secrets of such person.

[Relevant FWPCA provisions include Sections 304(h)(2)(B), 308(b), 402(b)(2) and 402(j); 40 C.F.R. § 124.35]

The authority required by paragraph 9 is found in Sections 204.026(3), (6), (11), (15), (20), and (23), 204.051.3, 204.051.4, 204.066.1 and 204.136(1) of the Missouri Clean Water Law.

With regard to subparagraph "9.a.(1)" above, Section 204.026(6) provides that the Commission shall "collect and disseminate information relating to water pollution and the prevention, control and abatement thereof." Section 204.026(15), set out in paragraph 8, supra, authorizes the Commission to exercise all incidental

powers necessary to assure that the State complies with the requirements of the FWPCA. And Section 204.136(1) provides that the Commission may:

"[t]ake all necessary and appropriate action to obtain for the state the benefits of any federal act, or to obtain approval of any state water pollution control program."

We read these sections in conjunction with the requirements of giving notice in Sections 204.051(3) and (4) as giving the Commission the authority to make public any NPDES permit, permit application, or form, if so required by the FWPCA.

With regard to subparagraph "9.a.(2)" above, Sections 204.026(11) and (15), 204.051.3 and 204.051.4 require public hearings upon all permit applications (See discussion in paragraph 8, supra.) Moreover, section 204.066.1 provides:

"At any public hearing all testimony taken before the commission shall be under oath and recorded stenographically. The transcript so recorded shall be made available to any member of the public. . ."

We read the above sections to require that any public comments, testimony or other documentation concerning a permit application be available to the public.

It should be noted that the statutes cited for the authority required by subparagraphs "9.a.(1)" and "9.a.(2)" above contain no "trade secret" or "confidential information" limitation. Therefore, it is our opinion that these statutes authorize disclosure of the information to the fullest extent required by the FWPCA.

With regard to the authority required by paragraph "9.a.(3)" above, Sections 204.026(20) and (23) control. As was discussed in paragraph 5, supra, these sections require monitoring, sampling,

record keeping and reporting by those maintaining point sources, and authorize investigations by the Commission to insure that the above requirements are complied with and to obtain independent information concerning discharge of water contaminants. Section 204.026(20), relating to commission investigations, further provides that:

"[i]nformation obtained under this section shall be available to the public unless it constitutes trade secrets or confidential information, other than effluent data, of the person from whom it is obtained, except when disclosure is required under any federal water pollution control act."

And Section 204.026(23) requires persons conducting the required testing, monitoring, record keeping and reporting to "make them public, except as provided in subdivision (20) of this section."

The last two cited sections obviously provide for disclosure of information as required by subparagraph "9.a.(3)" above. Moreover, the limitations on disclosure therein provided (i.e. trade secrets and confidential information) do not exceed limitations allowed by subparagraph "9.b." above. Specifically, the cited sections require the disclosure of effluent data even if such data constitutes a trade secret or confidential information. And disclosure is required, despite the character of the information, if the FWPCA requires disclosure. This last provision is particularly noteworthy in regard to disclosure to the EPA of information constituting a trade secret, as seems to be required by 40 C.F.R. § 124.35(c). It is our opinion that the above cited statutes provide the authority required by paragraph 9 above.

10. Authority to Terminate or Modify Permits.

Does the Missouri law provide authority to terminate or modify permits for cause, including the following:

- a. Violation of any condition of the permit (including, but not limited to, conditions concerning monitoring, entry, and inspection);
- b. Obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts; or
- c. Change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge?

[Relevant FWPCA provisions include Section 402(b)(1)(C); 40 C.F.R. §§ 124.45(b) and 124.72.]

The authority required by this paragraph is found in Sections 204.026(13) and 204.056 of the Missouri Clean Water Law.

Section 204.056.4 provides:

"Permits issued hereunder may be terminated or modified if obtained in violation of sections 204.006 to 204.141 or by misrepresentation or failing to fully disclose all relevant facts, or when required to prevent violation of any provision of sections 204.006 to 204.141, or to protect the waters of this state, when such action is required by a change in conditions or the existence of a condition which requires either a temporary or permanent reduction or elimination of the authorized discharge. . . ."

We read this section to provide the authority required by subparagraphs "10 b. and c." above.

With regard to subparagraph "10 a." above, Section 204.026(13) provides that the Commission shall "revoke" permits to prevent, control or abate any violation of the Missouri Clean Water Law or the FWPCA. Section 204.056.1 provides that the executive

secretary of the Commission shall institute investigations into "alleged violations of . . . any term or condition of any permit" Section 204.056.3 then provides that in the case where the executive secretary has attempted, but a violation cannot be eliminated by conference, conciliation or persuasion, or if necessary to immediately halt a danger to public health or welfare, the executive secretary "may file a complaint to revoke a permit" We read Sections 204.026(13) and 204.056 to authorize revocation of a permit for violation of any condition upon which the permit was issued. It is our opinion that the above cited sections provide the authority required by paragraph 10.

11. Authority to Abate Violations of Permits or the Permit Program.

Does the Missouri law provide authority to:

a. Abate violations of:

- (1) Provisions requiring persons to obtain permits;
- (2) Terms and conditions of issued permits;
- (3) Effluent standards and limitations and water quality standards (including toxic effluent standards and pretreatment standards applicable to dischargers into publicly owned treatment works); and
- (4) Requirements for recording, reporting, monitoring, entry, inspection, and sampling?

b. Apply sanctions to enforce violations described in paragraph (a) above, including the following:

- (1) Injunctive relief, without the necessity of a prior revocation of the permit;
- (2) Civil penalties;
- (3) Criminal fines for willful and negligent violations; and

(4) Criminal fines against persons who knowingly make any false statement, representation or certification in any form, notice, report, or other document required by the terms or conditions of any permit or otherwise required by the State as part of a recording, reporting, or monitoring requirement?

- c. Apply maximum civil and criminal penalties and fines which are comparable to the maximum amounts recoverable under Section 309 of the FWPCA or which represent an actual and substantial economic deterrent to the actions for which they are assessed or levied in which each day of continuing violation is a separate offense for which civil and criminal penalties and fines may be obtained?

[Relevant FWPCA provisions include Sections 402(b)(7), 309, 304(a)(2)(C), 402(h), 504; 40 C.F.R. §124.73.]

The authority required by this paragraph is found in Sections 204.026(20) and (23), 204.051, 204.056, and 204.076 of the Missouri Clean Water Law. The authority for the Commission to issue abatement orders is found in Section 204.056.3. The section provides that where there is a claimed violation of the Missouri Clean Water Law, or any standard, limitation, order, rule or regulation promulgated pursuant thereto, or a violation of any term or condition of a permit, one of the enforcement options available is for the executive secretary to order abatement.

With regard to the abatement of the specific categories of violations listed in subparagraph "11.a.", the violations and authorities for abatement orders issued by the Commission are:

- (1) Violations of provisions requiring persons to obtain permits -- Section 204.051.2 provides that it is "unlawful for any person to build, erect, alter, replace, operate, use or maintain any water contaminant or point source . . . unless he holds a

permit. . . ." Therefore, failure to obtain a permit before engaging in any of the acts specified in Section 204.051.2 is a violation of the Missouri Clean Water Law, for which an abatement order may issue.

(2) Violations of terms and conditions of issued permits -- Section 204.056.1 empowers the executive secretary to investigate, inter alia, the alleged violation of "any term or condition of any permit. . . ." Subsection 2 of that section provides that the executive secretary may, if he thinks it wise, endeavor to eliminate the violation by conference, conciliation or persuasion. Subsection 3 then provides that upon the failure of such conference, conciliation or persuasion, or if necessary to protect the health or welfare of persons from the discharge of pollutants, the executive secretary may order abatement. We read Section 204.056 to provide that the violation of the terms and conditions of an issued permit is subject to an abatement order by the Commission.

(3) Violations of effluent standards and limitations and water quality standards -- Sections 204.051.1(2) and (3) provide that it is unlawful for any person:

"(2) To discharge any water contaminants into any waters of the state which reduce the quality of such waters below the water quality standards established by the commission. . . ."

(3) To violate any pretreatment and toxic material control regulations, or to discharge any water contaminants into any waters of the state which exceed effluent regulations"

Therefore, violations of the standards and limitations specified above constitute violations of the Missouri Clean Water Law, for which an abatement order may issue.

(4) Violation of requirements for recording, reporting, monitoring, entry, inspection, and sampling -- Section 204.026(20) authorizes the Commission to conduct certain investigations, and in connection therewith to enter upon private or public property. That section further provides that:

"[n]o person shall refuse entry or access, requested for the purposes of inspection under this provision, to an authorized representative in carrying out the inspection."

Refusal by any person to grant entry or access to a commission representative would constitute a violation of the Missouri Clean Water Law, for which an abatement order may issue.

Section 204.026(23) provides, as was discussed in paragraph 5, supra, that the Commission shall require those owning or operating water contaminant sources to maintain equipment, engage in testing, monitoring, and sampling, keep records and file reports. The means of requiring such activity would be by promulgation of rules and regulations and issuance of appropriate orders. The violation of the applicable rule, regulation or order would be a violation of the Missouri Clean Water Law, for which an abatement order may issue.

The authority to apply sanctions to enforce violations described in subparagraph "a." above, to the extent required by subparagraph "b." above, is found in Section 204.076. With regard to injunctive relief, Section 204.076.1 provides, inter alia:

"In the event the commission or its executive secretary determines that any provision of sections 204.006 to 204.141 or standards, rules, limitations or regulations promulgated pursuant thereto, or permits issued by, or any final abatement order, other order, or determination made by the commission or the executive

secretary, or any filing requirement under section 204.006 to 204.141 or any other provision which this state is required to enforce under any federal water pollution control act, is being, was, or is in imminent danger of being violated, the commission or executive secretary may cause to have instituted a civil action in any court of competent jurisdiction for the injunctive relief to prevent any such violation or further violation. . . ."

It should be noted that Section 204.076 does not require the revocation of a permit or issuance of an abatement order before seeking injunctive relief. We read Section 204.076.1 to provide the authority required by subparagraph "b.(1)" above.

With regard to civil penalties, Section 204.076.1, in addition to the injunctive relief discussed above, also authorizes:

". . .the assessment of a penalty not to exceed ten thousand dollars per day for each day, or part thereof, the violation occurred and continues to occur, or both, as the court deems proper."

We read the above language to provide the authority required by subparagraph "b.(2)" above.

Criminal fines for willful and negligent violations are provided for in Section 204.076.3, which reads:

"Any person who willfully or negligently commits any violation set forth under subsection 1 shall, upon conviction, be punished by a fine of not less than twenty-five hundred dollars nor more than twenty-five thousand dollars per day of violation, or by imprisonment for not more than one year, or both. Second and successive convictions for violation of the same provision hereunder by any person shall be punished by a fine of not more than fifty thousand dollars per day of violation, or by imprisonment for not more than two years, or both."

We read this section to provide the authority required by subparagraph "b.(3)" above.

With regard to the subparagraph "b.(4)" above, Section 204.076.2 provides:

"Any person who knowingly makes any false statement, representation or certification in any application, record, report, plan, or other document filed or required to be maintained under sections 204.006 to 204.141 or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under sections 204.006 to 204.141 shall, upon conviction, be punished by a fine of not more than ten thousand dollars, or by imprisonment for not more than six months or by both."

We read this section to provide the authority required by subparagraph "b.(4)."

With regard to the authority required by subparagraph "c." above, the following points should be noted:

(1) The maximum civil penalty recoverable under Section 204.076.1 is \$10,000 per day of violation. This is the same civil penalty as is provided under the FWPCA.

(2) The maximum criminal fine for knowingly making a false statement, representation or certification under Section 204.076.2 is \$10,000, which is the same as the criminal penalty provided for such action under the FWPCA.

(3) The criminal fine for the willful or negligent commission of a violation, Section 204.076.3, is a minimum of \$2,500 and a maximum of \$25,000 per day, with the maximum fine doubling for second and successive convictions. This is the same fines as are provided under the FWPCA.

(4) Imprisonment for up to one year is provided under Section 204.076.3 for willful or negligent violations with a doubling of the maximum term for second and successive convictions. Imprisonment for up to six months is provided under Section 204.076.2 for knowingly making any false statement, representation or certification. These are the same terms as are provided for under the FWPCA.

The questions arises whether, before seeking civil or criminal penalties or fines or injunctive relief, the Commission must first exhaust administrative remedies via the abatement order procedure provided in Section 204.056.3. We note that Section 204.076.1 contains no qualifying language which would indicate that the administrative remedies must be exhausted before applying to the circuit court for relief. Section 204.076.1 provides that the commission or secretary "may cause to have instituted" the appropriate action. We read that section to provide for remedies which may be sought as an alternative to the administrative remedies provided in Section 204.056.3.

As was discussed in paragraphs "2.a." and "7", supra, although industrial users of publicly owned treatment works are not required to obtain permits under the Missouri Clean Water Law, the law does provide a means of direct enforcement of toxic material control and pretreatment effluent limitations against such industrial users. Reference should be made to those paragraphs for citations of the authority for such direct enforcement.

A final enforcement technique should be discussed. In the situation where a discharge of water contaminants presents a danger to public health, yet such discharge is not in violation of any regulation, standard or limitation of the Commission, the Commission has authority, nevertheless, to abate such discharge. Section 204.056.3 provides that an abatement order may be issued:

" . . . as required to immediately and effectively halt or eliminate any imminent or substantial endangerments to the health or welfare of persons resulting from the discharge of pollutants.
 . . . "

We read this section to provide the authority required to act against the so-called "emergency episodes" referred to in the letter accompanying your opinion request.

It is the opinion of this office that Missouri law does provide authority to meet the requirements of the FWPCA pertaining to state administration of the NPDES permit program. It is the further opinion of this office that Missouri law contains all the authority specifically referred to in paragraphs one through eleven above.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

ELECTIONS:
JUDGES:
NOMINATIONS:
CANDIDATES:

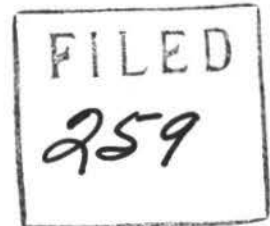
The judicial district committees of the twentieth judicial circuit are composed of the chairman and vice chairman of the county committees of Franklin, Gasconade and Osage

Counties and if there are parts of cities included in the twentieth judicial circuit, the ward committeemen and committeewomen from the wards in whole or in part in such parts of such cities are also included as members of the judicial district committee of the twentieth circuit.

OPINION NO. 259

July 19, 1974

Honorable W. E. Blackwell
Representative, District 120
Rural Route 2
Hermann, Missouri 65041



Dear Representative Blackwell:

This is in answer to your recent opinion request reading as follows:

"What constitutes the membership (source, numbers and position or titles) of the judicial district committee of the twentieth judicial circuit of Missouri comprising the counties of Osage, Gasconade and Franklin, and by whom are they elected and in what manner?"

"What effect if any does the fact that the county line of a county making up part of the judicial circuit runs through a city (part of the city being in the judicial circuit and part in another county) have on the makeup of the judicial district committee?"

You further state:

"House Bill 964 providing for an additional (second) circuit judge of the twentieth judicial circuit of Missouri was recently signed into law by the Governor of the State of Missouri. It provides that candidates shall be

Honorable W. E. Blackwell

nominated in the same manner as provided in Section 120.550, which section relates to 120.800 and 120.810.

"Legislative (representative districts) involved are: District No. 120 comprised of all of Maries and Osage Counties and part of Gasconade County: District No. 121 comprised of part of Franklin County: District No. 126 comprised of parts of Crawford, Franklin and Washington Counties: District No. 128 comprised of Dent and parts of Crawford, Gasconade, Iron, Phelps, Reynolds, and Washington Counties."

House Bill 964 of the 77th General Assembly, which becomes effective August 13, 1974, provides in part as follows:

"Section 1.1. Beginning on January 1, 1975, the circuit court of the counties of Franklin, Gasconade and Osage, composing the twentieth judicial circuit, shall be composed of two judges. Each judge shall separately try causes, exercise the powers, and perform all duties imposed upon circuit judges. The divisions of the circuit court shall be 'Circuit Court Division Number One' and 'Circuit Court Division Number Two'.

"Section 1.2. The judge of division two shall be elected at the general election in 1974 for a six-year term and candidates shall be nominated in the same manner as provided in Section 120.550, RSMo 1969, for that election only and the judge of division one shall be elected at the general election in 1976 for a six-year term, and their successors shall be elected for six-year terms. . . ."

Section 120.550 referred to in subsection 2 of Section 1 of House Bill 964 provides that the party committee of a district shall have authority to make nominations when there is a vacancy in the candidates for nomination.

The composition of a judicial district commission is provided for in Sections 120.800 and 120.810, RSMo, which provide as follows:

Honorable W. E. Blackwell

"Section 120.800. The county committee, or city committee, as the case may be, shall be composed of the committeemen and committee-women elected in the several townships, or voting districts, at the August primary next preceding and shall meet at the county seat of the several counties of this state, and at such place in any city not within a county as the chairman of the then existing city committee may designate, on the third Tuesday in August of the year in which the primary election is held, and organize by the election of one of its members as chairman and one of its members as vice chairman, one of whom shall be a woman, and a secretary and a treasurer, one of whom shall be a woman, but who may or may not be members of the committee. The county chairman and vice chairman so elected shall by virtue thereof become members of the party congressional, senatorial and judicial committees of the district of which their county is a part."

"Section 120.810.--1. In all counties of this state having more than one legislative district, there shall be elected a chairman and a vice chairman, one of whom shall be a woman, for each such legislative district, and the county committee and legislative district committees shall each at the same time elect a secretary and a treasurer, one of whom shall be a woman, but who may or may not be members of said committee.

2. The congressional, senatorial or judicial district committee of a district of which a county having more than one legislative district shall form a part, shall be composed of the county chairmen and vice chairmen of the several county committees, and the chairman and vice chairman of each of the several legislative districts.

3. The congressional, senatorial or judicial district committee of a district co-extensive with one county shall be the county committee.

Honorable W. E. Blackwell

4. The congressional, senatorial or judicial district committee of a district which shall be composed in whole or in part of a part of a city or part of a county shall include as members of such committee, the ward or township committeemen and committeewomen from such wards or townships included in whole or in part in such part of a city or part of a county forming the whole or a part of such district."

In view of the fact that the twentieth judicial circuit contains the entire counties of Franklin, Gasconade and Osage, the county chairman and vice chairman of Franklin, Gasconade and Osage Counties are by virtue of Section 120.800 members of the judicial committee of the twentieth judicial circuit.

We are enclosing Opinion 83, rendered August 20, 1968, to Representative George W. Parker and Opinion 139, rendered April 29, 1972, to Senator Richard M. Webster, which opinions hold that the provisions in subsection 1 of Section 120.810 providing for the election of a chairman and vice chairman in all counties of the state having more than one legislative district apply only to counties having two or more entire legislative districts within the county. In view of the statement in your opinion request, it is clear that no county in the twentieth judicial circuit has more than one legislative district. Therefore, the provisions of subsection 2 of Section 120.810 providing that a judicial district committee of a district in which a county having more than one legislative district shall form a part shall contain the chairman and vice chairman of each of the several legislative districts have no application to the twentieth judicial circuit.

Subsection 3 of Section 120.810 has no application to the twentieth judicial district committee because such subsection is applicable only to judicial circuits composed of only one county.

Subsection 4 of Section 120.810 provides that the judicial district committee of a district which is composed in part of a part of a city shall include as members of such committee the ward committeemen and committeewomen from the wards included in whole or in part in such part of the city forming a part of such district. Therefore, if there is a part of a city which forms a part of the twentieth judicial circuit, the ward committeemen and committeewomen from the wards included in whole or in part in such part of the city are members of the twentieth judicial circuit committee.

Honorable W. E. Blackwell

CONCLUSION

It is the opinion of this office that the judicial district committees of the twentieth judicial circuit are composed of the chairman and vice chairman of the county committees of Franklin, Gasconade and Osage Counties and if there are parts of cities included in the twentieth judicial circuit, the ward committeemen and committeewomen from the wards in whole or in part in such parts of such cities are also included as members of the judicial district committee of the twentieth circuit.

The foregoing opinion, which I hereby approve, was prepared by my assistant, C. B. Burns, Jr.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 83
8-20-68, Parker

Op. Ltr. No. 139
4-27-72, Webster

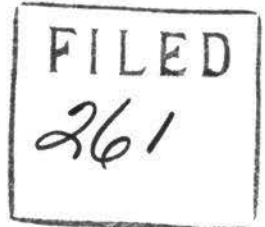
ASSESSORS:
TAXATION:
ASSESSMENTS:
CONSTITUTIONAL LAW:

Senate Bill No. 402, 77th General Assembly (1974) is unconstitutional in that it violates Article X, Section 4(a) of the Constitution of Missouri.

OPINION NO. 261

September 18, 1974

Mr. J. E. Riney, Chairman
State Tax Commission
Post Office Box 146
Jefferson City, Missouri 65101



Dear Mr. Riney:

This official opinion is issued in response to your request for a ruling on the following question:

"Are the provisions of Senate Bill No. 402, passed by the 77th General Assembly and approved by the Governor, which create a separate class of merchant known as 'motor vehicle dealers' and provide that motor vehicles and goods, wares, and merchandise held by such dealers are to be treated in a special manner with regard to ad valorem tax, constitutional in view of the restrictions in Article X, Section 3 of the Missouri Constitution prohibiting the levying and collecting of taxes in a nonuniform manner?

"If the act is constitutional, does it prohibit cities from collecting personal property tax on motor vehicles or goods, wares, and merchandise belonging to a 'motor vehicle dealer' based upon the true value in money of such merchandise?

"Subsection 2(3) of Section 1 of the act provides a tax of 57¢ on the goods, wares and merchandise other than motor vehicles belonging to a motor vehicle dealer. Does this tax rate apply to each part or piece of equipment maintained by a motor vehicle dealer in his inventory, and how and when is such tax to be collected?"

Mr. J. E. Riney

Article X, Section 3 of the Constitution of Missouri, to which you make reference in your question, provides as follows:

"Taxes may be levied and collected for public purposes only, and shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. All taxes shall be levied and collected by general laws and shall be payable during the fiscal or calendar year in which the property is assessed. Except as otherwise provided in this constitution, the methods of determining the value of property for taxation shall be fixed by law."

Article X, Section 4(a) of the Constitution of Missouri further provides as follows:

"All taxable property shall be classified for tax purposes as follows: class 1, real property; class 2, tangible personal property; class 3, intangible personal property. The general assembly, by general law, may provide for further classification within classes 2 and 3, based solely on the nature and characteristics of the property, and not on the nature, residence or business of the owner, or the amount owned. Nothing in this section shall prevent the taxing of franchises, privileges or incomes, or the levying of excise or motor vehicle license taxes, or any other taxes of the same or different types."
(Emphasis added.)

Senate Bill No. 402, 77th General Assembly (1974), provides as follows, in pertinent part:

"Section 1. As used in this act, unless the context clearly requires otherwise, the following terms mean:

(1) 'Motor Vehicle dealer' any person, firm, corporation, copartnership or association of persons primarily engaged in the business of selling motor vehicles, except farm tractors.

* * *

Mr. J. E. Riney

"2. Motor vehicles and the stock of goods, wares and merchandise held for use and sale by motor vehicle dealers in the ordinary course of their business are hereby classified as a separate class of personal property and in lieu of ad valorem personal property taxes, thereon, the value thereof is fixed and a motor vehicle property tax is imposed thereon as follows:

- (1) New motor vehicles
2.43 Dollars, (\$2.43).
- (2) Used motor vehicles
1.50 Dollars, (\$1.50).
- (3) Goods, wares, and merchandise other than motor vehicles
0.57¢ Dollars, (\$0.57)."

It is our opinion that Senate Bill No. 402 clearly violates Article X, Section 4(a) of the Constitution of Missouri. It declares "Motor vehicles and the stock of goods, wares and merchandise held for use and sale by motor vehicle dealers in the ordinary course of their business . . ." to be a separate class of personal property. The aforesaid constitutional provision prohibits classification of tangible personal property (which motor vehicles, goods, wares and merchandise certainly are) on the basis of the nature or business of the owner thereof. To classify some motor vehicles, goods, wares and merchandise in a different class from other motor vehicles, goods, wares and merchandise simply because they are held for use and sale by "motor vehicle dealers," rather than by other persons, is clearly a violation of the Constitution of Missouri.

Nor do we believe that any portion of Senate Bill No. 402 can be saved by Section 1.140, RSMo 1969, which provides as follows:

"The provisions of every statute are severable. If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of the statute are valid unless the court finds the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent."

Mr. J. E. Riney

It is our view that the intent of Senate Bill No. 402, taken as a whole, was to classify all tangible personal property held by motor vehicle dealers, as therein defined, as a separate class of personal property. This follows from the portion of Senate Bill No. 402 which provides that:

"The term 'merchant' includes motor vehicle dealers as defined in this act, but motor vehicle dealers shall not be subject to any ad valorem tax on his stock of goods, wares and merchandise, as otherwise prescribed by this chapter and a motor vehicle property tax as prescribed by this act shall be levied in lieu of such ad valorem tax."

This provision clearly evidences a legislative intent to classify all property held by motor vehicle dealers in a different fashion from property not held by motor vehicle dealers. Even if any portions of Senate Bill No. 402, taken separately, would be constitutional, it is our opinion that the elimination of the unconstitutional portions of the act would leave "the remaining portions of the statute so that they do not express the true legislative intent but are instead in conflict with it," so that, taken as a whole, "the statute should not be upheld." Preisler v. Calcaterra, 243 S.W.2d 62 (Mo. Banc 1951).

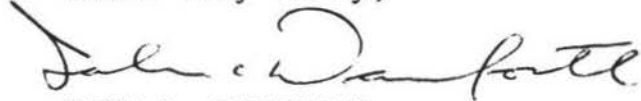
Because we believe that Senate Bill No. 402 is unconstitutional in its entirety, we do not believe it necessary to answer your other questions about its potential application.

CONCLUSION

Therefore, it is the opinion of this office that Senate Bill No. 402, 77th General Assembly (1974) is unconstitutional in that it violates Article X, Section 4(a) of the Constitution of Missouri.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mark D. Mittleman.

Yours very truly,



JOHN C. DANFORTH
Attorney General

RESORTS: Under the provisions of Senate Bill No. 348,
LIQUOR: Second Regular Session, 77th General Assembly,
LICENSES: which amends Section 311.095, RSMo, the Su-
pervisor of Liquor Control cannot issue a re-
tail by the drink liquor license to the lessee of the restaurant
premises of a motel-restaurant combination and a separate retail
by the drink license to the owner of the motel premises of a motel-
restaurant combination.

OPINION NO. 262

September 30, 1974

Honorable J. T. Howard
Representative, District 157
Route 2
Dexter, Missouri 63841



Dear Representative Howard:

This official opinion is in response to your request for a ruling whether under the provisions of Senate Bill No. 348, Second Regular Session, 77th General Assembly, a retail by the drink liquor license may be issued to the lessee of the restaurant premises of a motel-restaurant combination and a separate license issued to the owner of the motel premises of such motel-restaurant combination.

This question arises because various motel and hotel chains throughout the state frequently lease part of the facilities such as the restaurant to another concern for operation and management and such facilities are not under the direction and control of the management which operates the motel itself. We assume for the purposes of this opinion that all the requirements relating to size and amount of sales are met by the motel-restaurant.

Section 311.090, RSMo 1969, enacted by the legislature in 1939, provides for the licensing of a business engaged in the sale of intoxicating liquor by the drink and designates where such sales are legal. Such sales are not legal in any incorporated city having a population of 20,000 unless authorized by a vote in compliance with Sections 311.110 to 311.130, RSMo 1969. In Opinion No. 151, 1974 (copy enclosed), this office held that the provisions of Section 311.095, RSMo 1969, relating to "resorts" were an exception to and operated independently of the local option requirements.

Honorable J. T. Howard

Senate Bill No. 348, Second Regular Session, 77th General Assembly, redefined the term "resort" by eliminating the requirement that such an establishment be located in a county bordering on a lake having at least 250 miles of shoreline.

Subsection 1 of Section 311.095 was repealed and reenacted by Senate Bill No. 348 to read as follows:

"1. Notwithstanding any other provisions of this chapter to the contrary, any person who possesses the qualifications required by this chapter, and who now or hereafter meets the requirements of and complies with the provisions of this chapter, may apply for and the supervisor of liquor control may issue a license to sell intoxicating liquor, as in this chapter defined, by the drink at retail for consumption on the premises of any resort as described in the application. As used in this section the term 'resort' means any establishment having at least forty rooms for the overnight accommodation of transient guests, having a restaurant or similar facility on the premises at least sixty percent of the gross income of which is derived from the sale of prepared meals or food, or means a restaurant provided with special space and accommodations where, in consideration of payment, food, without lodging, is habitually furnished to travelers and customers, and which restaurant establishment's annual gross food sales for the past two years immediately preceding its application for a license shall not have been less than one hundred thousand dollars per year, or means a new restaurant establishment having been in operation for at least ninety days preceding the application for such license, with a projected experience based upon its sale of food during the preceding ninety days which would exceed not less than one hundred thousand dollars per year."
(Emphasis supplied)

The answer to your question depends upon the construction and interpretation that is to be accorded the underlined portions of Section 311.095(1).

Honorable J. T. Howard

There are certain well-established maxims of statutory construction. The primary rule is to ascertain and to give effect to the legislative intent. Edwards v. St. Louis County, 429 S.W. 2d 718 (Mo.Banc 1968). Effect should be given to every word, phrase, and sentence. State ex inf. Taylor ex rel. Oster v. Hill, 262 S.W.2d 581 (Mo.Banc 1954). Another fundamental rule in the construction of statutes is embodied in the maxim "expressio unius ex exclusion ulterius" which means that the expressed mention of one thing, etc., implies the exclusion of another. City of Hannibal v. Minor, 224 S.W.2d 598 (St.L.Ct.App. 1949).

Applying the above rules, we believe that the answer to your question must be in the negative. A retail by the drink liquor license authorizes the consumption of intoxicating liquor on the licensed premises. Senate Bill No. 348 authorizes a retail by the drink license to a "resort" (singular). The premises which constitute this singular "resort" is an establishment having at least forty rooms for overnight accommodation and a restaurant or similar facility. We do not believe that it was intended that such resort premises could be divided and separate licenses issued to a portion thereof. A motel or a hotel by itself without any restaurant would not meet the definition of a "resort" and the owner or operator of such a facility would clearly not be entitled to a retail by the drink liquor license. Had the legislature intended that separate licenses could be issued, one to the restaurant portion of the premises and one to the motel portion of the premises, it could have so stated. But it did not.

We have been advised by the Supervisor of Liquor Control that the above is consistent with his interpretation of these provisions and that he is not issuing separate licenses. Although the interpretation and construction of a statute by the agency charged with its administration and enforcement is not binding or conclusive, it is entitled to great weight. Foremost-McKesson, Inc. v. Davis, 488 S.W.2d 193 (Mo.Banc 1972).


CONCLUSION

It is the opinion of this office that under the provisions of Senate Bill No. 348, Second Regular Session, 77th General Assembly, which amends Section 311.095, RSMo, the Supervisor of Liquor Control cannot issue a retail by the drink liquor license to the lessee of the restaurant premises of a motel-restaurant combination and a separate retail by the drink license to the owner of the motel premises of a motel-restaurant combination.

Honorable J. T. Howard

The foregoing opinion, which I hereby approve, was prepared by my assistant, Daniel P. Card II.

Yours very truly,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 151
4-10-74, Garrett

ELECTIONS:
JUDGES:
NOMINATIONS:
CANDIDATES:

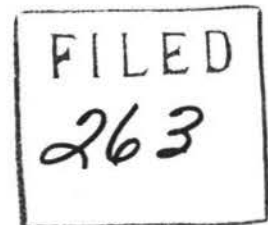
The judicial district committee of the 23rd Judicial Circuit of each political party shall be composed of the chairman and vice chairman of the county committees of Wash-

ington and Jefferson Counties and the chairman and vice chairman of the 122nd, 123rd and 124th legislative districts. The nominations may be made by the committee members holding such offices between August 13, 1974 and the third Tuesday in August 1974, and if not made by such committee members, may be made by the committee members elected the third Tuesday in August 1974.

OPINION NO. 263

July 19, 1974

Honorable Howard M. Garrett
Representative, District 124
1540 Westvale
Festus, Missouri 63028



Dear Representative Garrett:

This is in answer to your opinion request in which you inquire as to the composition of the Democratic and Republican Judicial District Committees of the 23rd Judicial Circuit. Such committees are authorized under the provisions of House Bill 1122 of the 77th General Assembly to nominate candidates for circuit judge of the 23rd Judicial District to be elected at the November 1974 election.

House Bill 1122 of the 77th General Assembly, which repeals and reenacts Section 478.550, RSMo, effective August 13, 1974, provides as follows:

"1. The circuit court of the counties of Jefferson and Washington, composing the twenty-third judicial circuit, shall be composed of three judges, and each of the judges shall separately try causes, exercise the powers and perform all duties imposed upon circuit judges. The divisions of the circuit court shall be 'Circuit Court Division Number One', 'Circuit Court Division Number Two' and 'Circuit Court Division Number Three.'

"2. The judge of division one shall be elected in 1970 for a term of six years.

Honorable Howard M. Garrett

The judge in division two shall be elected in 1972 for a term of six years. The judge of division three shall be elected at the general election in 1974 for a term of six years. The duly elected and qualified successors of the judges of divisions one, two and three shall be elected for terms of six years.

"3. The candidates for judge of division number three in the election to be held in 1974 only, shall be selected in the same manner as provided for nominations to fill vacancies caused by resignation or withdrawal of a candidate as provided for in section 120.550, RSMo."

Section 120.550, RSMo, provides for nomination by party committees of the county, district or state when a vacancy in candidates for the nomination exists. The composition of the judicial district committee of the 23rd Judicial Circuit is found in the provisions of Sections 120.800 and 120.810, RSMo. Since the entire counties of Washington and Jefferson are within the 23rd Judicial Circuit, the chairman and vice chairman of Washington and Jefferson County Committees are by virtue of Section 210.800 members of the judicial district committee of the 23rd Judicial Circuit.

Under the provisions of Section 120.810(2), the chairman and vice chairman of the three legislative districts wholly within Jefferson County, that is Legislative Districts Nos. 122, 123 and 124, are also members of the judicial district committee of the 23rd Judicial Circuit. Section 120.810(2) has no application to Washington County because such county does not contain two or more entire legislative districts. See Opinion 259-1974 (copy enclosed). We are informed that there are no parts of cities which are a part of the 23rd Judicial Circuit, therefore, the provisions of Section 120.810(4) have no application to the 23rd Judicial Circuit.

Section 29 of Article III of the Constitution of Missouri provides that with the exception of appropriation acts or emergency acts laws passed by the General Assembly shall take effect ninety days after the adjournment of the session in which such laws were passed. Therefore, the effective date of House Bill 1122 of the 77th General Assembly is August 13, 1974, which is ninety days after the adjournment of the Second Regular Session of the 77th General Assembly on May 15, 1974.

Honorable Howard M. Garrett

You also ask whether nominations of candidates for the office of judge to be elected at the November 1974 election are to be made after August 13, 1974 by the committeemen and committeewomen comprising the judicial district committee of the 23rd Judicial Circuit who will be in office between the date of August 13, 1974 and the third Tuesday in August 1974, the day appointed for organizing the new party committees, (Sections 120.800 and 120.810, RSMo), or whether the nomination must be made by the committee members composing the judicial circuit committee elected on the third Tuesday in August 1974.

It is our view that the present committeemen and committee-women who are members of the judicial district committee of the 23rd Judicial Circuit may make such selection after August 13, 1974 and before the organization of the new committees and such nomination will be valid, but that if the nomination is not made prior to the third Tuesday in August, the nomination will then be made by the committee members of the 23rd Judicial Circuit committee elected on the third Tuesday in August 1974.

CONCLUSION

It is the opinion of this office that the judicial district committee of the 23rd Judicial Circuit of each political party shall be composed of the chairman and vice chairman of the county committees of Washington and Jefferson Counties and the chairman and vice chairman of the 122nd, 123rd and 124th legislative districts. The nominations may be made by the committee members holding such offices between August 13, 1974 and the third Tuesday in August 1974, and if not made by such committee members, may be made by the committee members elected the third Tuesday in August 1974.

The foregoing opinion, which I hereby approve, was prepared by my assistant, C. B. Burns, Jr.

Very truly yours,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 259-1974

July 11, 1974

OPINION LETTER NO. 265

Dr. Arthur L. Mallory
Commissioner of Education
State Department of Education
Jefferson State Office Building
Jefferson City, Missouri 65101

Dear Dr. Mallory:

This letter is in response to your request for our review and certification of the State Board of Education's State Program for Adult Education under the Adult Education Act of 1970.

Our review has taken into consideration the Adult Education Act of 1970, P.L. 91-230; the federal regulations applicable to such act (45 C.F.R. part 166; 38 Fed. Reg. 16131 et seq. (June 20, 1973)); Article III, Section 38(a), Article IV, Section 15, and Article IX, Sections 1(b), 2(a) and 2(b), Missouri Constitution; Sections 161.092, 171.096, and 178.430, RSMo 1969; and Section 171.091, RSMo 1973 Supp., and related provisions.

It is the opinion of this office:

1. That the Missouri State Board of Education is the State Board in the state within the meaning of the Adult Education Act.

2. That said Board has the authority under state law to submit a state plan.

3. That said Board has authority to administer and supervise the administration of the foregoing state plan.

4. That all of the provisions of the foregoing plan are consistent with state law.

Dr. Arthur L. Mallory
Page Two

5. That the State Commissioner of Education has been duly authorized by the State Board of Education to submit the foregoing state plan and to represent the Missouri State Board of Education in all matters pertaining thereto.

6. That the State Treasurer has the authority under state law to receive, hold and disburse federal funds under the state plan.

In conjunction with this letter opinion which constitutes our official certification of the state plan, we have completed a certification form consistent with this opinion letter.

Very truly yours,

JOHN C. DANFORTH
Attorney General

CERTIFICATION OF ATTORNEY GENERAL

State of Missouri

I hereby certify:

1. That the Missouri State Board of Education is the State Board in the state within the meaning of the Adult Education Act (Public Law 91-230).
2. That said Board has the authority under state law to submit a state plan.
3. That said Board has authority to administer or supervise the administration of the foregoing state plan.
4. That all of the provisions of the foregoing plan are consistent with state law.
5. That the State Commissioner of Education has been duly authorized by the State Board of Education to submit the foregoing state plan and to represent the Missouri State Board of Education in all matters pertaining thereto.
6. The State Treasurer has authority under state law to receive, hold and disburse federal funds under the state plan.

JOHN C. DANFORTH
Attorney General

(Date)

November 1, 1974

OPINION LETTER NO. 266
Answer by letter-Card

Mr. Charles M. Kiefner
Adjutant General of Missouri
1717 Industrial Drive
Jefferson City, Missouri 65101

Dear General Kiefner:

This letter is in response to your request asking whether the Missouri National Guard can enter into a contract with a fire protection district under which the National Guard makes an annual payment to the fire protection district and the district provides fire protection to the National Guard buildings outside the limits of the fire protection district.

You state that the Jefferson Barracks National Guard facility in St. Louis County encompasses an area of land that lies adjacent to, but not within, the incorporated Mehlville Fire Protection District. The district has proposed to provide fire protection service to the facility under contract with the National Guard for an annual fee.

Upon review of the powers of both the fire district and the National Guard, we believe that such a contract can be entered into.

The statutory powers of the fire district include the following:

"For the purpose of providing fire protection to the property within the district, the district, and on its behalf the board, shall have the following powers, authority and privileges:

* * *

Mr. Charles M. Kiefner

(4) To enter into contracts, franchises and agreements with any person, partnership, association or corporation, public or private, affecting the affairs of the district, including contracts with any municipality, district or state, or the United States of America, and any of their agencies, political subdivisions or instrumentalities, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service relating to the control or prevention of fires, including the installation, operation and maintenance of water supply distribution, fire hydrant and fire alarm systems; provided, that a notice shall be published for bids on all construction or purchase contracts for work or material or both, outside the authority contained in subdivision (9) below, involving an expense of two thousand dollars or more;" (Emphasis supplied) Section 321.600, RSMo 1969

It would be possible to interpret the foregoing provisions to limit the exercise of powers by the fire protection district to their geographic boundaries. However, we believe that such an interpretation would be unduly narrow and contrary to the legislative intent.

The basic rule of statutory construction is to seek the legislative intent. State ex rel. State Highway Commission v. Wiggins, 454 S.W.2d 899 (Mo. Banc 1970). If a statute is susceptible of more than one construction, it must be given that which will best effectuate its purpose rather than one which would defeat it, even though such construction is not within the strict literal interpretation. Household Finance Corporation v. Robertson, 364 S.W.2d 595 (Mo. Banc 1963).

Subdivision (4), by its language, purports to provide broad authority to a fire district to enter into cooperative arrangements with other public entities such as other fire districts, the state of Missouri or the United States or any of their agencies. It is to be noted that the underlined portions of subdivision (4) generally follow the provisions of Section 70.220 implementing the provisions of Article VI, Section 16, Constitution of Missouri. In Opinion No. 213, 1963 (copy enclosed), this office in interpreting the phrase "common service" stated:

Mr. Charles M. Kiefner

" . . . The construction of the meaning of the words 'common service' does present difficulty. We believe it should be given a rather broad meaning. This is necessary to accomplish the purposes and economies in local government that the writers of the Constitution envisioned. We believe that the courts would be inclined to give it a meaning which would permit municipalities or other political subdivisions to contract with one another to perform almost any administrative service which they each have a duty at one time or another to perform. Therefore, it would seem that services like assessment and collection of taxes, street maintenance and repair, fire prevention and fire fighting, and police service, are the character of services included within the meaning of this language on the theory that each of these services would be common services required to be performed by each municipality and would therefore fall within the meaning of the language 'common service' of the Constitution, referred to above."

See also, Opinion No. 258, 1963 (copy enclosed). Clearly, under Section 70.220 fire districts have the authority to enter into a cooperative arrangement with another fire district. We do not believe by enacting Section 321.600, the legislature intended to restrict the power of a fire protection district to enter into cooperative arrangements to provide service outside the district. Had it intended to do so, portions of subdivision (4) would be superfluous.

The Adjutant General is charged by Section 41.160(13) with the control and management of armories which includes the Jefferson Barracks. It is clear that under such section he has the duty to insure that there is adequate fire protection for these armories.

Since the fire protection district and the National Guard both have authority to provide fire protection for buildings, a cooperative agreement for fire protection for buildings in the fire protection district and buildings of the National Guard is an agreement for a common service under provisions of Sections 321.600 and 70.220, RSMo.

Mr. Charles M. Kiefner

For the foregoing reasons, it is our view that the Missouri National Guard can contract with the Mehlville Fire District for fire protection services at Jefferson Barracks.

Yours very truly,

JOHN C. DANFORTH
Attorney General

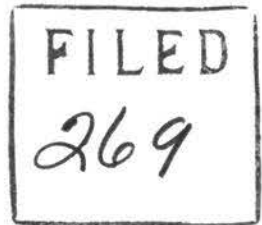
Enclosures: Op. No. 213
5-15-63, Cantrell

Op. No. 258
11-4-63, Avery

September 16, 1974

OPINION LETTER NO. 269
Answer by letter-Mittleman

Honorable William B. Waters
State Senator, District 17
First Office Building
17 West Kansas Street
Liberty, Missouri 64068



Dear Senator Waters:

This official opinion is issued in response to your request for a ruling on the following question:

"Whether or not cities of the Third or Fourth Class, or villages, may borrow money and pledge as security therefor federal grants to be made to said cities under the Major Disaster Declaration, Public Law 91-606."

You have stated the facts giving rise to this question as follows:

"Clay County, as well as other counties in the State of Missouri, were declared disaster areas by reason of the May, 1974 floods. These counties, as well as municipalities, then became entitled to federal financial assistance under the Major Disaster Declaration, Public Law 91-606.

"In administering the law the federal and state governments each inspect the area and arrive at a determination as to the amount of money to which the political subdivision is entitled. Shortly thereafter, one-half of that amount is paid to the governmental entity. The final one-half is not paid until the repairs have been completed, inspected and the expenditures audited. As a practical matter, this payment is not usually

Honorable William B. Waters

received until about eighteen months after the job has been completed.

"Because of the long delay in payment, both counties and cities have experienced great difficulty in finding contractors who are willing to do the job and then wait for eighteen months after it is finished before they are paid in full.

"The City of Excelsior Springs, a Third Class City, desires to meet this problem by borrowing money from one of the local banks and adopting a resolution which in effect pledges the final payment to come from the government, as security for a loan from the bank. Interest on the advancement would be paid from the city's general fund. Should it be determined that Excelsior Springs has this authority, other towns and villages in our county, as well as in other parts of the state, could very well follow this procedure. As it now stands, the lending agencies are reluctant to make the loan until the city's authority has been clarified."

Your question may be answered simply by stating that the Constitution and laws of Missouri make no provision for a municipal corporation to incur indebtedness in excess of its anticipated revenue for the current year and unencumbered balances from previous years by borrowing money from a bank pursuant to a resolution of the municipal governing body. You have informed us that the revenue which the City of Excelsior Springs expects to receive from the federal grants would not be received within the same year in which the indebtedness is to be contracted. Article VI, Section 26(a) of the Constitution of Missouri provides as follows:

"No county, city, incorporated town or village, school district or other political corporation or subdivision of the state shall become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years, except as otherwise provided in this Constitution."

Article VI, Section 26(b), provides as follows:

Honorable William B. Waters

"Any county, city, incorporated town or village or other political corporation or subdivision of the state, by vote of two-thirds of the qualified electors thereof voting thereon, may become indebted in an amount not to exceed five per cent of the value of taxable tangible property therein as shown by the last completed assessment for state or county purposes, except that a school district by a vote of two-thirds of the qualified electors voting thereon may become indebted in an amount not to exceed ten per cent of the value of such taxable tangible property."

It is clear from these constitutional provisions that a municipal corporation can only incur indebtedness in excess of the current year's anticipated revenue and unencumbered balances from previous years by a vote of its people, and not by resolution of its governing body.

In the case of Grand River Tp., De Kalb County v. Cooke Sales & Service, Inc., 267 S.W.2d 322, 325 (Mo. 1954), the Supreme Court held:

". . . Section 26 of Article VI of the Constitution prohibits any political subdivision of the state from becoming 'indebted in an amount exceeding in any year the income and revenue provided for such year', 26(a), except 'by vote of two-thirds of the qualified electors thereof voting thereon'. 26(b). It has been well established that this means no contract of such a political subdivision is valid which obligates it to make payments in subsequent calendar years. 'The plain meaning of this constitutional provision is that any such municipal corporation may spend or contract to spend (become indebted) "in any (calendar) year the income and revenue provided for such year," but beyond that it cannot go in creating a debt for any purpose or in any manner, except by consent of two-thirds of the voters.' Hawkins v. Cox, 334 Mo. 640, 66 S.W.2d 539, loc. cit. 543; see also Book v. Earl, 87 Mo. 246; Trask v. Livingston County, 210 Mo. 582, 109 S.W. 656, 37 L.R.A., N.S., 1045; Ebert v. Jackson County, Mo. Sup., 70 S.W.2d 918; Sager

Honorable William B. Waters

v. City of Stanberry, 336 Mo. 213, 78 S.W.2d
431; Missouri Toncan Culvert Co. v. Butler
County, 352 Mo. 1184, 181 S.W.2d 506. . . ."

Yours very truly,

JOHN C. DANFORTH
Attorney General



OFFICES OF THE

JOHN C. DANFORTH
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

July 25, 1974

OPINION LETTER NO. 270

Honorable William Dick Fickle
Prosecuting Attorney
Platte County
Post Office Box B
Platte City, Missouri 64079

Dear Mr. Fickle:

This letter is in reply to your recent inquiry concerning the following question:

"Under Section 59.050 RSMo (H.B. 1318), how may a candidate for his party's nomination as candidate for the office of Circuit Clerk ex officio Recorder of Deeds withdraw from the Clerk's race and enter the race for the newly established office of Recorder of Deeds?"

Actually, you have asked two questions. First, you ask how a candidate for office of circuit clerk ex officio recorder of deeds may withdraw from the race, at this time.

Section 120.375, RSMo, provides as follows:

"1. Any person who has filed a declaration of candidacy or any person nominated in the August primary election by his party as a candidate for an elective office, who wishes to withdraw as a candidate, must do so by filing a written, sworn statement of withdrawal in the office in which his original declaration of candidacy was filed not later than forty-five days prior to the day of the primary or general election, as the case may be.

Honorable William Dick Fickle

"2. The name of a person who has properly filed a declaration of candidacy, or of a person nominated by his party for office, who has not given notice of withdrawal as provided in subsection 1, shall, except in case of death, be printed on the official primary or general election ballot, as the case may be."

Since it is presently less than forty-five days until the primary election, it is our view that any person who has properly filed for the office may not withdraw his name from the ballot. Therefore, the only method of withdrawal available would be to follow the procedures described in Section 120.375, RSMo (quoted above) after the primary election. (This obviously assumes the person is victorious in his primary race).

Secondly, you have asked how a person may enter the race for the new office of recorder of deeds. House Bill 1318, 77th General Assembly, Second Regular Session, with an emergency clause, was signed by the Governor on June 21, 1974. It is applicable to Platte County according to the information you have provided. Further, the emergency clause specifically refers to Platte County. It provides for this exact situation. House Bill 1318 states, in part:

"2. Candidates for the office of recorder of deeds in the election to be held in 1974 only, shall be selected in the same manner as provided for nominations to fill vacancies caused by resignation or withdrawal of a candidate as provided for in section 120.550, RSMo."

Section 120.550, RSMo, states:

"1. The party committee of the county, district or state, as the case may be, shall have authority to make nominations in the following cases:

(1) When a vacancy in the candidates for nomination as a party candidate for election to any office shall occur by reason of death or resignation after the last day in which a person may file as a candidate for nomination;

Honorable William Dick Fickle

(2) When any person nominated as the party candidate for any office shall die or resign before election;

(3) When a vacancy in office which is to be filled for the unexpired term at the following general election shall occur after the last day in which a person may file as a candidate for nomination.

"2. Nominations to fill vacancies caused by death shall be filed, as the case may be, either with the secretary of state not later than fifteen days before the day fixed by law for the election of the person in nomination or with the election authority not later than ten days before such election. Nominations to fill vacancies caused by resignation or withdrawal of a candidate shall be filed with the secretary of state or election authority not later than thirty days before the day fixed for the election.

"3. No name shall be allowed on the ballot until the required fee has been paid."

Therefore, it is our view that, for the 1974 election of the new office of recorder of deeds, each county party committee shall nominate a candidate and that nomination shall be filed with the appropriate authority no later than thirty days before the election date.

Very truly yours,



JOHN C. DANFORTH
Attorney General

August 21, 1974

OPINION LETTER NO. 272
Answer by letter-Mansur

Honorable James A. Noland, Jr.
State Senator, District 33
Osage Beach, Missouri 65065



Dear Senator Noland:

This is in response to your request for an opinion from this office as follows:

"Can the county health board of a county of the third class (Dallas County) require or request the county treasurer of such county to transfer funds in the health board's general account presently in a regular bank account and not necessary to meet current normal operating expenses to an interest bearing bank account, certificates of deposits, or other interest bearing investment? Can the county treasurer legally so invest the funds of the health board, and if so, will the interest earned accrue to the benefit of the health board or to the general revenue account of the county?

"Funds on deposit in the general account of the Dallas County Health Department are in excess of what is necessary to meet the current normal operating expenses of the board and are not presently earning interest."

County health centers may be established under Sections 205.010 to 205.155, inclusive, RSMo.

Section 205.042, subdivision 4, RSMo, provides in part as follows:

Honorable James A. Noland, Jr.

" . . . All moneys received for the county health center shall be deposited in the county treasury to the credit of the county health center fund, and paid out only upon warrants ordered drawn by the county court upon properly authenticated vouchers of the board of health center trustees."

Under this statutory provision, all moneys received for the county health center must be deposited in the county treasury to the credit of the county health center fund.

Depositories for county funds in the county treasury are governed by Sections 110.130 to 110.260, RSMo, inclusive.

Section 110.150, RSMo Supp. 1973, provides as follows:

"1. The county court, at noon on the first day of the May term in each odd-numbered year, shall publicly open the bids, and cause each bid to be entered upon the records of the court, and shall select as the depositories of all the public funds of every kind and description going into the hands of the county treasurer, and also all the public funds of every kind and description going into the hands of the ex officio collector in counties under township organization, the deposit of which is not otherwise provided for by law, the banking corporations or associations whose bids respectively made for one or more of the parts of the funds shall in the aggregate constitute the largest offer for the payment of interest per annum for the funds; but the court may reject any and all bids.

"2. The interest upon each fund shall be computed upon the daily balances with the depository, and shall be payable to the county treasurer monthly, who shall place the interest on the school funds to the credit of those funds respectively, the interest on all county hospital funds and hospital district funds to the credit of those funds, the interest on county health center funds to the credit of those funds and the interest on all other funds to the credit of the county general fund.

"3. The county clerk shall, in opening the bids, return the certified checks deposited with

Honorable James A. Noland, Jr.

him to the banks whose bids are rejected, and on approval of the security of the successful bidders return the certified checks to the banks whose bids are accepted." (Emphasis supplied)

Section 110.170, RSMo, provides that the county court shall make an order designating the successful bidders as depositories of the funds belonging to the county treasury and the county treasurer or ex officio collector shall immediately upon making of the order transfer to the depositories part or parts of the funds respectively left to the depositories under the selection.

The trustees of the county health center have only such authority as is expressly given by statute and such implied authority as is necessary to make effectual the purposes of the authority expressly given. King v. Maries County, 249 S.W. 418 (Mo. 1923).

Under the above statutes, funds belonging to the county health center are to be deposited in the county treasury. It is the duty of the county court to select a depository for funds going into the hands of the county treasurer; and it is the duty of the county treasurer under Section 110.170, RSMo, to deposit the funds belonging to the county health center with the depository selected by the county court. The interest upon the county health center funds is to be credited to the credit of the county health funds.

We enclose herewith Opinion No. 177 issued by this office on December 20, 1963, to Mr. Robert B. Mackey, to the effect that the county court is not limited to demand deposits only, but may, when such can be prudently done without detriment to the county, place a portion of the funds on interest-bearing time deposits, open account, but not in certificates of deposit or bonds or other investment.

It is our view therefore that all funds belonging to the county health center in a county of the third class shall be deposited in the county treasury to the credit of the county health center fund, and it is the duty of the county treasurer to deposit said funds in the county depositories selected by the county court and all interest on said funds paid by the county depository shall be credited to the county health fund. Said

Honorable James A. Noland, Jr.

funds may be deposited in interest-bearing time deposits, open account, but not in certificates of deposit or bonds or other investments.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 177
12-20-63, Mackey



OFFICES OF THE

JOHN C. DANFORTH
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

December 5, 1974

OPINION LETTER NO. 275

Mr. Lawrence Graham, Director
Department of Social Services
221 West High Street
Jefferson City, Missouri 65101

Dear Mr. Graham:

You have requested our legal opinion on the following question:

"Can the nursing home administrator, owner, or legal counsel demand an inspection during the time after the administrative hearing denying a license has been held, after a decision has been rendered by the Director of the Missouri Division of Health, and while an appeal to the courts by the nursing home management is pending?"

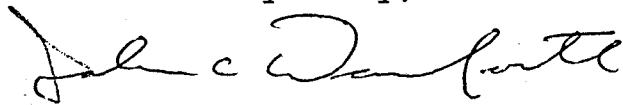
You advise us that in 1970 the Division of Health revoked the license of a particular nursing home, that the home subsequently changed ownership, that the new owner applied for a nursing home license, that an administrative hearing was conducted in 1973 and a decision made to deny the application for license, that the new owner's appeal from this decision is now pending in the circuit court, and that the new owner has again applied for a license and demanded an inspection of the premises.

It is our view that if a person submits an application for a nursing home license pursuant to the Nursing Home Licensure Law, Sections 198.011-198.170, RSMo, and the nursing home license is denied, and that if, during the pendency of an appeal of the denial of such license, the person who was denied a license can rectify any conditions that may have been instrumental in denying him a license and that if such person, during the pendency of the appeal, asserts that he does have an institution which complies with

Mr. Lawrence Graham

all the licensing requirements, the person could then make an application for a license and the Division of Health would have to inspect the premises to determine whether or not, as of the date he made the new application for a license, he was entitled to be issued such license. It is our view that if, at any time, a person applying for a license contends that the facility meets all the requirements for the granting of such license, an inspection should be made and a new decision made on granting the license even though there is still under appeal a decision that the person was not, at a previous time, entitled to be issued such license.

Yours very truly,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH
Attorney General

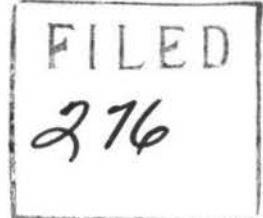


JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY
July 26, 1974

OPINION LETTER NO. 276

Honorable James F. Conway
Representative, District 65
3811 Flora Place
St. Louis, Missouri 63110




Dear Mr. Conway:

This letter is in response to your question asking whether Senate Bill 122, 77th General Assembly, First Regular Session, with respect to the establishment of the office of medical examiner in the City of St. Louis, is constitutional. It is our understanding that your question is prompted by an opinion rendered by the St. Louis City Counselor which holds that such Bill violates the Missouri Constitution in several respects.

We note that one of the interwoven arguments made in the memorandum of the St. Louis City Counselor concerns the question of the status of the City of St. Louis under the laws of this state and the effect of the legislation upon such city in its capacity as a city-county. A similar question concerning the status of the City of St. Louis as a city-county under the statutes of this state is now under submission before the Missouri Supreme Court in the case entitled, The State of Missouri ex rel. Harold P. Robb, Director, Division (Department) of Mental Health et al., Relators vs. John H. Poelker et al., Respondents, No. 58,563. This office is involved in Relators' pending case and since there are questions of law overlapping such case and the question you pose, it is our view that we are not in a position to rule on the question you pose until such time as the pending case is determined by the Court.

We suggest, however, with respect to Senate Bill 122, that the presumptions as to the validity of the enactment are sufficiently strong to enable the mayor to take affirmative action pursuant to the Bill's provisions.

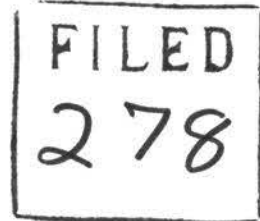
Very truly yours,


C. B. Burns, Jr.
Assistant Attorney General

August 21, 1974

OPINION LETTER NO. 278
Answer by letter-Rothschild

Mr. James Wilson, Director
Department of Natural Resources
12th Floor Jefferson Building
Jefferson City, Missouri 65101



Dear Mr. Wilson:

This is in response to your request for an opinion on the following questions:

"1. In whose name is title now vested for land held, prior to the enactment of the Omnibus State Reorganization Act of 1974, in the name of the State Park Board?

"2. In whose name will title be held for land acquired in the future by the Department of Natural Resources?"

Section 15.10 of C.C.S.H.C.S.S.C.S.S.B. No. 1, First Extraordinary Session, 77th General Assembly, (hereinafter referred to as Senate Bill No. 1) states, in part, as follows:

"The fee title to all real property now owned or hereafter acquired by the state of Missouri, or any department, division, commission, board or agency of state government, other than real property owned or possessed by the state highway commission, conservation commission, state park board, and the university of Missouri, shall on the effective date of this act vest in the governor. The governor may not convey or otherwise transfer the title to or other

Mr. James Wilson

interest in such real property, unless conveyance or transfer is first authorized by an act of the general assembly. . . ." (Emphasis added).

Section 10.3 of Senate Bill No. 1 states, in part:

". . . The State Park Board, Chapter 253 RSMo is transferred to the Department of Natural Resources by Type I transfer."

Section 1.7.(1)(a) defines the Type I transfer as follows:

"Under this act a type I transfer is the transfer to the new department or division of all the authority, powers, duties, functions, records, personnel, property, matters pending, and all other pertinent vestiges of the existing department, division, agency, board, commission, unit, or program to the director of the designated department or division for assimilation and assignment within the department or division as he shall determine, to provide maximum efficiency, economy of operation and optimum service. All rules, orders and related matter of such transferred operations shall be made under direction of the director of the new department."

Section 253.040, RSMo, relating to the State Park Board's authority to acquire real property, states, as follows:

"1. The board is hereby authorized to accept or acquire by purchase, lease, donation, agreement or eminent domain, any lands, or rights in lands, sites, objects or facilities which in its opinion should be held, preserved, improved and maintained for park or parkway purposes. The board is authorized to improve, maintain, operate and regulate any such lands, sites, objects or facilities when such action would promote the park program and the general welfare. The board is further authorized to accept gifts, bequests or contributions of money or other real or personal property to be expended for any of the purposes of sections 253.010 to 253.100; except that any

Mr. James Wilson

contributions of money to the state park board shall be deposited with the state treasurer to the credit of the state park earnings fund and expended upon authorization of the state park board for the purposes of sections 253.010 to 253.100 and for no other purposes.

"2. In the event the right of eminent domain be exercised, it shall be exercised in the same manner as now or hereafter provided for the exercise of eminent domain by the state highway commission."

From the above-quoted provisions of law, it is clear that the State Park Board had the authority to acquire and hold title to real property prior to the creation of the Department of Natural Resources, as provided in Senate Bill No. 1. Furthermore, it is clear that the authority of the State Park Board to acquire real property was transferred to the Department of Natural Resources.

What may not be clear, however, is the provision of Section 15.10 of Senate Bill No. 1 which expressly excludes real property held by the State Park Board from the application of such section which requires title to all state property (other than those excepted) to vest in the governor. The State Park Board's authority has succeeded to the Department of Natural Resources and the question becomes whether the legislature intended the property held by a successor agency to the State Park Board also to be excluded from the requirements of Section 15.10.

Keeping in mind the nature of a Type I transfer, it is our view that the legislature intended that the Department of Natural Resources, as successor to the authority of the State Park Board, be exempt from the provisions of Section 15.10 of Senate Bill No. 1. The legislature, in one part of Senate Bill No. 1, authorized the creation of the Department of Natural Resources and transferred all authority of the State Park Board to it (Sections 10.1, 10.3), and, in another part, still referred to the State Park Board (Section 15.10). It is our view that the legislature, in Section 15.10, included any successor agency to the State Park Board. Therefore, the Department of Natural Resources may hold real property that previously was held in the name of the State Park Board, in its own name.

We believe, also, that it is clear from this conclusion, that the Department of Natural Resources may hold title to property it acquires, under its authority as successor to the authority of the State Park Board, in its own name.

Mr. James Wilson

Therefore, it is our view that (1) real property held by the State Park Board, prior to creation of the Department of Natural Resources, is now held in the name of the Department of Natural Resources and, (2) real property acquired in the future by the Department of Natural Resources, as successor to the authority of the State Park Board, will be held in the name of the Department of Natural Resources.

Very truly yours,

JOHN C. DANFORTH
Attorney General



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

November 21, 1974

OPINION LETTER NO. 279

Honorable Dan Bollow
Prosecuting Attorney
Shelby County
308 East Walnut Street
Shelbina, Missouri 63468

Dear Mr. Bollow:

You have requested our legal opinion on the question of whether Section 190.070, RSMo, permits an organized ambulance district to annex a portion of an adjoining organized ambulance district.

The Ambulance District Law, Sections 190.005-190.085 (L. Mo. 1971-1972, p. 231), provides for the formation of such districts out of contiguous territory in one or more counties, such territory having at least two thousand inhabitants and an assessed valuation of two million five hundred thousand dollars. The territory may include municipalities, but it may not include any part of an existing incorporated ambulance district, Section 190.010, RSMo. If upon referendum there is a simple majority vote in favor of the district, the county court must declare its organization, Section 190.045, RSMo. Ten percent of the persons or fifty percent of the voters residing within the territory not a part of the ambulance district may petition for inclusion within the district; and if upon referendum a simple majority of votes in the district and in the proposed added area approve the annexation, the county must declare the territory a part of the district and describe its altered boundaries, Section 190.070, RSMo. When an organized district does not operate an ambulance service and the voters therein have refused to authorize bonds at three elections, a referendum to dissolve the district must be conducted and the district dissolved upon majority vote to do so at such referendum, Section 190.085, RSMo.

Honorable Dan Bollow

The statute providing for annexation of area to an organized ambulance district (Section 190.070, RSMo) does not expressly stipulate that the proposed added area must not lie within another organized ambulance district as do annexation provisions in other laws governing special purpose districts, e.g., street light maintenance districts, Section 235.210(2), RSMo (L. Mo. 1947, Vol. 1, p. 452); sewer districts, Section 249.132(1), RSMo (L. Mo. 1951, p. 627); fire protection districts, Section 321.300(2), RSMo (L. Mo. 1947, Vol. 1, p. 432).

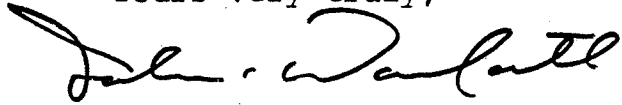
On the other hand, the ambulance district law contains no express authorization for an organized ambulance district to extend its boundaries so as to include territory situated in a different organized ambulance district. Neither does it contain any provision for detachment or exclusion of specific territory from an organized ambulance district as do other special purpose district laws, e.g., public water supply districts (area to be served by city water supply system), Section 247.170, RSMo (L. Mo. 1949, p. 255); fire protection districts, Section 321.310, RSMo (L. Mo. 1947, Vol. 1, p. 432); county library district (area to be served by school district's free public library), Section 182.130, RSMo (L. Mo. 1965, p. 312); street light maintenance districts, Section 235.220, RSMo (L. Mo. 1947, Vol. 1, p. 452).

In these circumstances, we cannot assume that the legislature intended that an ambulance district whose boundaries have been definitely described (Section 190.015) as an incident of its initial organization can thereafter surrender or lose a portion of its territory to an adjoining organized ambulance district. Since there is no provision for detachment and exclusion of area from an organized ambulance district, such an interpretation would produce the anomaly of the annexing ambulance district being permitted to do subsequently what in view of Section 190.010 it could not do initially (i.e., include within its boundaries area within an organized ambulance district). Furthermore, without detachment and exclusion provisions, annexation of territory from one ambulance district could result in the affected area receiving duplicative ambulance service (Section 190.060) and be subjected to a double tax (the fifteen cents ordinary levy of each district and any additional levy for bonded indebtedness approved by either district). Finally, if annexation of area from one ambulance district to another could be said to have necessarily caused a detachment and exclusion of the area from the losing ambulance district, thereby avoiding a duality of service and taxation in the area, there would exist the possible anomaly of the losing district having less than the minimum population or assessed property valuation than was required for its initial organization, Section 190.015, RSMo.

Honorable Dan Bollow

We are accordingly of the opinion that an ambulance district, organized under the Ambulance District Law (Sections 190.005-190.085, RSMo), may not annex and add to its area any territory situated in an adjoining organized ambulance district.

Yours very truly,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

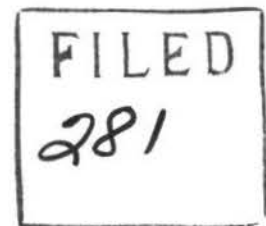
JOHN C. DANFORTH
Attorney General

PENSIONS:
RETIREMENT:
JUVENILE OFFICERS:
STATE RETIREMENT SYSTEM: 1. Juvenile officers who are paid in whole or in part out of state appropriations are entitled to membership and prior membership credit in the Missouri State Employees' Retirement System. Deputy juvenile officers are not entitled to membership or prior membership credit in the Missouri State Employees' Retirement System.
2. Such juvenile officers are entitled to membership in the Missouri State Employees' Retirement System on the full amount of their salaries.

OPINION NO. 281

October 31, 1974

Honorable Harold L. Volkmer
Representative, District 13
120 North Third
Hannibal, Missouri 63401



Dear Representative Volkmer:

This is to acknowledge receipt of your request for an opinion from this office which reads as follows:

- "1. In view of the case of Hawkins vs. Missouri State Employees Retirement System, 487 S. W. 2nd 580 (Missouri Court of Appeals - 1973) which related to whether or not a court reporter was entitled to membership and prior membership credit in the Missouri State Retirement system and said court reporter being at that time paid partly by the State and partly by the County, are juvenile officers and deputy juvenile officers of the State of Missouri who are paid partly by the State from specific appropriations for that purpose and partly by the Counties, now members of the Missouri State Employees Retirement System?
- "2. If your answer to the first question is in the affirmative, are said employees entitled to prior service credit, and to what extent?

Honorable Harold L. Volkmer

- "3. Must any contributions be made to the system by these juvenile officers and deputy juvenile officers.
- "4. You have said juvenile officers and deputy juvenile officers are members of the Missouri State Employees Retirement System, are they entitled to credit for the full amount of salary paid to them from all sources?"

This opinion is applicable only to juvenile officers and deputy juvenile officers who are presently employed as juvenile officers and deputy juvenile officers and who did not retire before January 8, 1973.

We will first consider your first two questions in regard to whether or not juvenile officers and deputy juvenile officers are eligible for membership or prior membership credit as a result of the case Hawkins v. Missouri State Employees' Retirement System, 487 S.W.2d 580 (Mo.Ct.App. at K.C. 1972), which became final on January 8, 1973. The Hawkins case dealt with the questions as to whether or not a court reporter was entitled to membership and prior membership credit in the retirement system. In this regard, Section 485.060, RSMo 1969, provides that a court reporter shall receive an annual salary of \$12,000 per year. Section 485.065, RSMo 1969, provides that salary \$5,500 is to be paid out of the state treasury. In reaching its decision, the court determined whether or not an individual court reporter came within the definitions of "employee" and "department" as those terms are defined in subsections (11) and (15) of Section 104.310, RSMo 1969:

"(11) 'Department', any department, institution, board, commission, officer, court or any agency of the state government receiving state appropriations including allocated funds from the federal government and having power to certify payrolls authorizing payments of salary or wages against appropriations made by the federal government or the state legislature from any state fund, or against trusts or allocated funds held by the state treasurer;

* * *

Honorable Harold L. Volkmer

"(15) 'Employee', any elective or appointive officer or employee of the state who is employed by a department and earns a salary or wage in a position normally requiring the actual performance by him of duties during not less than one thousand five hundred hours per year, including each member of the general assembly, but not including any employee who is covered under some other retirement or benefit fund to which the state is a contributor; except this definition shall not exclude any employee as defined herein who is covered only under the Federal Old Age and Survivors' Insurance Act, as amended. As used in sections 104.310 to 104.550, the term 'employee' shall include civilian employees of the Army National Guard or Air National Guard of this state who are employed pursuant to section 709 of title 32 of the United States Code and paid from federal appropriated funds;"

The Kansas City Court of Appeals concluded that a court reporter was entitled to membership and prior membership credit in the Missouri State Employees' Retirement System. The reasoning of the court was that a court reporter was "an employee" of the state as defined in subsection (15) of Section 104.310, RSMo 1969, and was employed by "a department" which received state appropriations as defined in subsection (11) of Section 104.310, RSMo 1969.

Subsection 1 of Section 211.351, RSMo 1969, provides that the juvenile court shall appoint a juvenile officer and other necessary juvenile court personnel to serve under the direction of the court in each county of the first and second class. In addition, it is provided that the circuit judge in circuits comprised of third and fourth class counties may appoint a juvenile officer and other necessary personnel to serve the judicial circuit, or circuit judges of any two or more adjoining circuits may by agreement, confirmed by judicial order, appoint a juvenile officer and other necessary personnel to serve their respective judicial circuits. Section 211.381, RSMo Supp. 1973, provides for the compensation of juvenile court personnel in each county of the first class and the City of St. Louis. Section 211.391, RSMo Supp. 1973, provides for the compensation of juvenile court personnel in counties of the second class and in those judicial circuits containing a county of the second class. Section 211.392, RSMo Supp. 1973, provides for the compensation of juvenile

Honorable Harold L. Volkmer

court personnel in those judicial circuits comprised of counties of the third and fourth class. Lastly, Section 211.393, RSMo Supp. 1973, reads as follows:

"1. The salaries and expenses of all juvenile court personnel in the circuit composed of a single county of the first or second class and in the city of St. Louis are payable monthly out of county or city funds, as the case may be, except that one-half of the salary of the juvenile officer of any such circuit in which he is engaged full time is payable monthly by the state of Missouri, but not to exceed the sum of seven thousand eight hundred dollars annually. The payment by the state of Missouri shall be made to either the juvenile officer, or to the county or the city of St. Louis.

"2. In circuits composed only of counties of the third and fourth class, and in circuits containing two or more counties, one of which is a second class county, the salaries and expenses are payable out of the county funds and prorated among the several counties served upon a ratio determined by a comparison of the respective populations of the counties involved, except that one-half of the salary of the juvenile officer of any such circuit in which he is engaged full time is payable monthly by the state of Missouri, but not to exceed the sum of five thousand nine hundred dollars annually."

It should also be noted that the following appropriations for court reporters is found in Laws of Missouri 1972 at page 24:

"Section 4.290. To the Comptroller
For Personal Service and expenses
of court reporters of circuit
courts and courts of criminal
corrections
Personal Service and Expenses
From General Revenue. . . . \$592,500"

Similarly, the following appropriation for juvenile officers is found in Laws of Missouri 1972 at page 24:

Honorable Harold L. Volkmer

"Section 4.300. To the Comptroller
For the compensation of juvenile
officers
Personal Service
From General Revenue. . . . \$194,000"

As a result of the foregoing statutory provisions, it is our view that the situation of juvenile officers is essentially the same as that of court reporters. The reasoning of the Kansas City Court of Appeals in the Hawkins case, therefore, applies; and a juvenile officer is considered to be an "employee" of the state as defined in subsection (15) of Section 104.310, RSMo 1969, and is employed by a "department" which receives state appropriations as defined in subsection (11) of Section 104.310, RSMo 1969. We therefore conclude that a juvenile officer is entitled to membership and prior membership credit in the Missouri State Employees' Retirement System. However, it is our view that the situation as to deputy juvenile officers is different from that of court reporters. The reason being that Section 211.393 does not provide that these individuals are to be paid by the state. In addition, the above appropriation indicates that only juvenile officers receive state appropriations, and not deputy juvenile officers. We therefore conclude that deputy juvenile officers are not entitled to membership and prior membership credit in the Missouri State Employees' Retirement System.

We next consider your fourth question which reads as follows:

- "4. You have said juvenile officers and deputy juvenile officers are members of the Missouri State Employees Retirement System, are they entitled to credit for the full amount of salary paid to them from all sources?"

The above issue was also considered by the Kansas City Court of Appeals in the Hawkins case involving court reporters. In this regard, the definition of "compensation" in subsection (9) of Section 104.310, RSMo Supp. 1973, reads as follows:

"(9) 'Compensation', all salary and wages payable out of any state, federal, trust, or other funds to an employee for personal services performed for the state, except amounts received as salary or wages payable in lieu of annual leave and sick leave after date of retirement;"

Honorable Harold L. Volkmer

In construing the above-statutory definition, the Court of Appeals determined that the matter of services for the state was the important factor and that the source from which the employee was paid should not be deemed controlling. Therefore, it was the opinion of the Court of Appeals that the definition was clear and unambiguous so as to require all of the court reporters' compensation to be considered for the purpose of computing retirement, even though part of their salary was paid out of state funds and another part was paid out of county funds. It is submitted that similar reasoning is applicable to juvenile officers. Consequently, we conclude that juvenile officers and not deputy juvenile officers are entitled to membership in the Missouri State Employees' Retirement System on the full amount of their statutory salary, whether paid out of state or county funds.

We next consider your third question in regard to whether or not any contributions are required to be made to the Retirement System by juvenile officers. We must decline to render an opinion on this issue at this time for the reason that we consider this to be a question to be decided by the Board of Trustees of the Missouri State Employees' Retirement System, and since this office is required by Section 104.520, RSMo 1969, to furnish legal services upon request to the Retirement System, we may be involved in litigation concerning this question.

CONCLUSION


It is the opinion of this office that:

1. Juvenile officers who are paid in whole or in part out of state appropriations are entitled to membership and prior membership credit in the Missouri State Employees' Retirement System. Deputy juvenile officers are not entitled to membership or prior membership credit in the Missouri State Employees' Retirement System.

2. Such juvenile officers are entitled to membership in the Missouri State Employees' Retirement System on the full amount of their salaries.

The foregoing opinion, which I hereby approve, was prepared by my assistant, B. J. Jones.

Yours very truly,



JOHN C. DANFORTH
Attorney General



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

October 22, 1974

OPINION LETTER NO. 283

Honorable Robert O. Snyder
Representative, District 95
506 Olive, Room 605
St. Louis, Missouri 63101

Dear Representative Snyder:

This letter opinion is in response to the following inquiry:

"May a 4th class city allow the payment of any pension other than the LAGERS Pension to an employee who has not had 10 years of service by the age of 65?"

The LAGERS Plan--Local Government Employees' Retirement System--is provided for in Sections 70.600 to 70.760, RSMo 1969, as amended.

Section 70.615, RSMo 1969, states:

"After October 13, 1967, a political subdivision shall not commence coverage of its employees who are neither policemen nor firemen under another plan similar in purpose to this system, other than under this system, except the federal social security old age, survivors, and disability insurance program, as amended; except that any political corporation or subdivision of this state, now having or which may hereafter have an assessed valuation of forty million dollars or more, which does not now have a pension system for its officers and employees adopted pursuant to state law, may provide by proper legislative action of its governing body for the pensioning of its officers and employees

Honorable Robert O. Snyder

and the widows and minor children of deceased officers and employees under a plan separate and apart from that provided in sections 70.600 to 70.760 and appropriate and utilize its revenues and other available funds for such purposes."

Enclosed please find a photostatic copy of Opinion No. 128, Owens, August 7, 1972. This opinion holds that:

"It is the opinion of this office that a city is prohibited by Section 70.615, RSMo from establishing a pension and retirement fund for employees who are other than policemen or firemen on an independent basis and not under the Lagers Retirement Plan (Sections 70.600 to 70.760, RSMo 1969, as amended) other than the Federal Social Security Old Age, Survivors and Disability Insurance program, as amended, unless the city has an assessed valuation of at least forty million dollars and does not now have a pension system for its officers and employees adopted pursuant to state law."

According to the Office of the St. Louis County Assessor, the City of Glendale has an assessed valuation of \$20,789,887 for 1973. In accordance with the standards of the LAGERS statute and the holding of this office in Opinion No. 128, Owens, it is our view that at this time the City of Glendale is proscribed by Section 70.615, RSMo 1969, from adopting an independent pension plan regardless of the age, tenure, or occupation of the person that plan proposes to cover.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 128
8-7-72, Owens



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

JOHN C. DANFORTH
ATTORNEY GENERAL

October 25, 1974

OPINION LETTER NO. 286

Honorable Hardin C. Cox
Representative, 6th District
605 Bluff Street
Rock Port, Missouri 64482

Dear Representative Cox:

This letter is in response to your question asking:

"What authority does the county court of a third class county have to enforce the provisions of sections 260.200 to 260.245, RSMo Supp. 1973 (solid waste disposal) by requiring mandatory county wide collection and imposing mandatory charges; more specifically, can a county court of a third class county issue an enforceable court order requiring people in a subdivision located in an unincorporated area of the county to submit to mandatory solid waste collection and to pay a mandatory collection fee therefor? If so, how would such an order be enforced?"

Section 260.215, RSMo Supp. 1973, provides in pertinent part:

"1. Except as provided in subsection 2, each city and each county or a combination of cities and counties shall provide individually or collectively for the collection and disposal of solid wastes within its boundaries; shall be responsible for implementing their approved plan required by section 260.220 as it relates to the storage, collection, transportation, processing, and disposal

Honorable Hardin C. Cox

of their solid wastes; and may purchase all necessary equipment, acquire all necessary land, build any necessary buildings, incinerators, transfer stations, or other structures, lease or otherwise acquire the right to use land or equipment. Each city and county, including those affected by the provisions of subsection 2, may levy and collect charges for services, and may levy an annual tax not to exceed ten cents on the one hundred dollars assessed valuation, as authorized by article X, section 11(c), of the constitution for public health purposes to implement a plan for solid waste management, and to do all other things necessary to provide for a proper and effective solid waste management system; except that, the county may not levy a service charge or annual tax upon the inhabitants of any incorporated city, town or village that has an approved plan for solid waste management, unless the city, town or village contracts with the county for solid waste management and consents to the county service charge or tax levy. The tax or service charge authorized by this section shall not be levied if the tax or service charge is levied pursuant to some other provision of law, but if a tax is levied for the operation of a sanitary landfill and such tax is less than the maximum amount authorized by this section, a tax in an amount equal to the difference between such tax and that authorized in this section may be levied and collected." (Emphasis added.)

Thus, in answer to your question, the legislature has given the county express authority to levy service charges in such areas. Such debts may be collected if necessary in a court of proper jurisdiction.

Very truly yours,



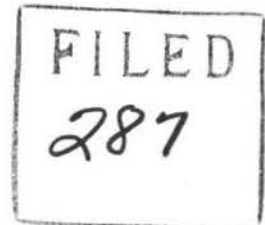
JOHN C. DANFORTH
Attorney General

LIENS: Section 429.010 (S.C.S.H.S. House Bill No. 1251, 77th General Assembly, Second Regular Session) with respect to mechanic's liens requires the "NOTICE TO OWNER" to be printed in "ten point bold type." The normal typewriter is not capable of printing a typeface in "ten point bold type." The underlining of type which is not "bold" or bold-face does not make it so. There is no requirement that lien waivers be provided a consumer by an original contractor as a condition precedent to the filing of a mechanic's lien.

OPINION NO. 287

November 14, 1974

Honorable George E. Murray
Representative, District 90
3 Williamsburg Road
Creve Coeur, Missouri 63141



Dear Representative Murray:

This is in response to your request for an official opinion from this office on the following questions:

S.C.S.H.S. House Bill No. 1251, 77th General Assembly, Second Regular Session, amended Section 429.010, RSMo. The amendment provides in part a requirement for a written disclosure of certain information to be printed in "ten point bold type." Your first question is "will the statutory requirement of ten point bold type be fulfilled by the use of standard typewriter lettering consisting of all capital letters, and if not, will the underlining of the statutory language meet the requirement of bold type?"

Section 1, subsection (a) of the amendment provides that compliance with subsection 1 shall be a condition precedent to the creation, existence or validity of any mechanic's lien. Your second question is "does the refusal by a contractor to give a lien waiver in a case of a disputed bill constitute a failure to comply with subsection 1, so as to invalidate a lien, assuming that the contractor had previously given the required notice in proper form?"

Honorable George E. Murray

Subsection 1 of Section 429.010 provides:

"Every original contractor, who shall do or perform any work or labor upon, or furnish any material, fixtures, engine, boiler or machinery for any building, erection or improvements upon land, or for repairing the same, under or by virtue of any contract shall provide to the person with whom the contract is made prior to receiving payment in any form of any kind from said person, (a) either at the time of the execution of the contract, (b) when the materials are delivered, (c) when the work is commenced, or (d) delivered with first invoice, a written notice which shall include the following disclosure language in ten point bold type:

NOTICE TO OWNER

FAILURE OF THIS CONTRACTOR TO PAY THOSE PERSONS SUPPLYING MATERIAL OR SERVICES TO COMPLETE THIS CONTRACT CAN RESULT IN THE FILING OF A MECHANIC'S LIEN ON THE PROPERTY WHICH IS THE SUBJECT OF THIS CONTRACT PURSUANT TO CHAPTER 429, RSMo. TO AVOID THIS RESULT YOU MAY ASK THIS CONTRACTOR FOR 'LIEN WAIVERS' FROM ALL PERSONS SUPPLYING MATERIAL OR SERVICES FOR THE WORK DESCRIBED IN THIS CONTRACT. FAILURE TO SECURE LIEN WAIVERS MAY RESULT IN YOUR PAYING FOR LABOR AND MATERIAL TWICE.

(a) Compliance with subsection 1 hereof shall be a condition precedent to the creation, existence or validity of any mechanic's lien in favor of such original contractor.

(b) Any original contractor who fails to provide the written notice set out in subsection 1. hereof shall be guilty of a misdemeanor and upon conviction shall be fined not less than \$500 nor more than \$1000."

In response to the first question presented for our consideration, although normal typewriter lettering with pica typeface

Honorable George E. Murray

is larger than ten points, it is not "bold" or boldface type as required by subsection 1(d) of the amendment to Section 429.010, RSMo. A special mechanism is available from some companies which manufacture typewriters, but the typeface of normal office or home typewriters is not capable of producing lettering which is "ten point bold type." The underlining of typewritten material does not create "bold type."

In response to your second question, the amendment to Section 429.010, RSMo, only requires that the "NOTICE TO OWNER" printed in the amendment itself be provided the consumer by the original contractor ". . . prior to receiving payment in any form of any kind from said person (a) either at the time of the execution of the contract, (b) when the materials are delivered, (c) when the work is commenced, or (d) delivered with first invoice, . . ." There is no requirement that lien waivers be provided the consumer as a condition precedent to the filing of a valid mechanic's lien on the subject property.

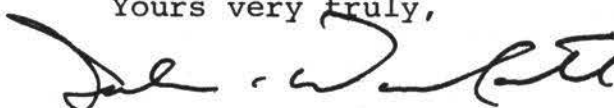
CONCLUSION

It is the opinion of this office that Section 429.010 (S.C.S.H.S. House Bill No. 1251, 77th General Assembly, Second Regular Session) with respect to mechanic's liens requires the "NOTICE TO OWNER" to be printed in "ten point bold type." The normal typewriter is not capable of printing a typeface in "ten point bold type." Further, the underlining of type which is not "bold" or boldface does not make it so.

There is no requirement that lien waivers be provided a consumer by an original contractor as a condition precedent to the filing of a mechanic's lien.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Harvey M. Tettlebaum.

Yours very truly,



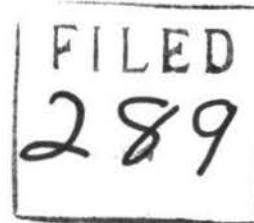
JOHN C. DANFORTH
Attorney General

ELECTIONS: (1) A person may be designated to
ELECTION CLERKS: serve as an election judge or clerk
ELECTION JUDGES: in a precinct in which he does not
reside if the election authority cannot find sufficient qualified persons within the precinct to act as election officials, and (2) persons so selected can vote an absentee ballot if the precinct in which they serve as election judges or clerks is located outside the county where they are registered to vote but not otherwise.

OPINION NO. 289

October 18, 1974

Honorable Lowell McCuskey
Prosecuting Attorney
Osage County Courthouse
Linn, Missouri 65051



Dear Mr. McCuskey:

This is in response to your request for an opinion. In the request you have asked the following question:

"Can an election judge or clerk be designated to serve in a precinct in which he does not reside when the appointing authority cannot find sufficient qualified persons within the precinct who will act as election officials, and if so, whether such persons can vote an absentee ballot."

Section 111.171, RSMo 1969, concerns the qualifications of election judges and clerks. That section provides as follows:

"1. No person shall be qualified to act as judge or clerk of any registration or election in this state unless he is legally entitled to vote at the next election following his appointment. He must be a person of good repute and character who can speak, read and write the English language. He must reside in the precinct, ward, township or election district for which he is selected to act. He must not hold any office or employment under the United States, the state of Missouri, or under the county, city, or other political

Honorable Lowell McCuskey

subdivision involved in the election to be held at the time of his appointment. He must not be a candidate for any office at the next ensuing election but a notary public shall not be disqualified from acting as a judge or clerk.

"2. No person shall be appointed or serve as judge or clerk in any election or registration who has been convicted of an offense punishable by imprisonment by the state department of corrections, or who has been convicted and confined in a county jail, workhouse or house of corrections within five years prior to his appointment." (Emphasis added.)

As is clear from Section 111.171, an election judge or clerk must reside in the precinct, ward, township, or election district for which he is selected to act. However, a variance from this statutorily required qualification will not invalidate an election.

". . . the law governing the appointment of judges and clerks is clearly directory, and courts will not nullify the result of votes honestly cast and counted, although the statute has not been strictly complied with. . . ." Breuninger v. Hill, 210 S.W. 67, 71 (Mo. Banc 1919).

It is true that an election will not be deemed invalid when the statute concerning election judges and clerks is not complied with literally. However, this is not the same as saying that no effort need be made to comply with the law. Sanders v. Lacks, 43 S.W. 653 (Mo. 1897), demonstrates the need to follow the statutory requirements.

". . . No voter should be disfranchised on account of a mere irregularity occasioned by the neglect or misconduct of election officers (over whose conduct he has no control), unless the legislature has declared that such irregularity, neglect, or misconduct should avoid the election, or render the voter's ballot illegal. . . . [However] There was no evidence that there was in this any intentional or fraudulent deviation from

Honorable Lowell McCuskey

the law, or anything other than an innocent mistake as to the demands of the election statute. . . ." Id. at 654.

Thus, it is the opinion of this office that a good faith effort must be made to follow the election law requirements. Even though an election would not be overturned because of irregularities, variances from the requirements should not intentionally be allowed. Nonetheless, as we pointed out in our Opinion No. 116, issued March 13, 1974, to the Honorable James C. Kirkpatrick, copy of which is attached hereto, the law does not require the impossible. If there are not sufficient qualified persons within a precinct who will act as election officials, we believe it is better to conduct the election within that precinct with judges and clerks who are not residents of the precinct than without any judges and clerks at all. We believe it is more important to have appropriate officials to supervise the conduct of the election than it is to require that such officials comply strictly with Section 111.171.

Your second question is whether persons appointed from outside a precinct to serve as election judges or clerks within such a precinct may vote an absentee ballot. This question is governed primarily by Section 112.010, RSMo Supp. 1973, which provides as follows:

"Any duly qualified voter of the state of Missouri, other than a person in military or naval service, who expects to be absent from the county in which he is a qualified voter on the day of any special, general or primary election at which any presidential preference is indicated or any candidates are chosen or elected, for any congressional, state, district, county, town, city, village, precinct or judicial offices or at which questions of public policy are submitted, or any person who through illness or physical disability expects to be prevented from personally going to the polls to vote on election day or any person whose religious beliefs prevent him from personally going to the polls to vote on election day, may vote at such election as provided in sections 112.010 to 112.110."

From this statutory provision, we conclude that a person selected to serve as a judge or clerk of an election held in a

Honorable Lowell McCuskey

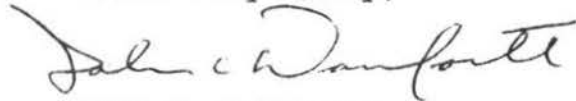
precinct other than the one in which he resides may vote an absentee ballot only if he is serving as a judge or clerk in a precinct located outside the county in which he is a qualified voter. There is no provision in Section 112.010 which would allow a person to cast an absentee ballot for the reason that he will be absent from the precinct in which he is registered to vote.

CONCLUSION

Therefore, it is the opinion of this office that (1) a person may be designated to serve as an election judge or clerk in a precinct in which he does not reside if the election authority cannot find sufficient qualified persons within the precinct to act as election officials, and (2) persons so selected can vote an absentee ballot if the precinct in which they serve as election judges or clerks is located outside the county where they are registered to vote but not otherwise.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mark D. Mittleman.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 116
3-13-74, Kirkpatrick

DEPARTMENT OF MENTAL HEALTH:
SPECIAL EDUCATION:
STATE BOARD OF EDUCATION:

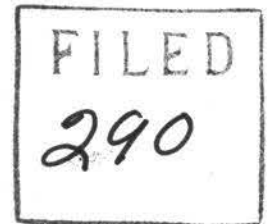
(1) Sections 162.670 et seq., RSMo Supp. 1973, give responsibility for providing special educational

services for all handicapped and severely handicapped children to local school districts, special school districts and the State Board of Education. The Department of Mental Health has the duty to assure that children in its programs are receiving special educational services, either by providing them under the provisions of Chapter 202, RSMo, or by procuring them from the responsible educational agency; (2) The Department of Mental Health may use state-appropriated funds to provide transportation for its patients to and from special educational programs, whether those programs are provided by the Department of Mental Health itself, by a school district or special school district, by the State Board of Education, or by a public or private agency under contract; and (3) Federal developmental disability funds may be used, with the approval of the Governor's Council on Mental Retardation and Other Developmental Disabilities, for the transportation of developmentally disabled students to and from special education programs for the handicapped and severely handicapped.

December 6, 1974

OPINION NO. 290

Harold P. Robb, M.D., Director
Department of Mental Health
2002 Missouri Boulevard
Jefferson City, Missouri 65101



Dear Dr. Robb:

This official opinion is in response to your request for a ruling on the following questions:

1. What is the responsibility and authority of the Department of Mental Health with regard to the education of handicapped and severely handicapped children who are in-patients of state mental health facilities or who are patients of the Department of Mental Health on community placement?
2. May state funds appropriated to the Department of Mental Health be used to

Harold P. Robb, M.D., Director

provide transportation for students receiving special educational services provided under contract to the State Board of Education?

3. May federal funds received by Missouri under the Developmental Disability Act be used to provide transportation for students receiving special educational services provided under contract to the State Board of Education?

1.

On July 1, 1974, a new Missouri statute went into effect creating a comprehensive program of special educational services. Sections 162.670 et seq., RSMo Supp. 1973. Under this law, special educational services are mandated for "handicapped children" and "severely handicapped children," as separately defined in Section 162.675. The education of "handicapped" children is the initial responsibility of local school districts or special school districts, but if those districts do not provide the required education, it is the responsibility of the State Board of Education to arrange for the contracting of services with other districts or with private or public agencies, with the cost to be charged to the school district. Sections 162.700, 162.705. "Severely handicapped" children are the educational and financial responsibility of special school districts, where they exist, or of the State Board of Education directly. Section 162.725. In short, the responsibility for the education of handicapped and severely handicapped children rests with school districts, special school districts and the State Board of Education.

Even though this responsibility is placed on the educational agencies, the Department of Mental Health must assure that all handicapped children admitted to its programs or facilities receive special educational services. This duty is spelled out in the first sentence of Section 162.970, which reads as follows:

"1. Handicapped children who are admitted to the programs or facilities provided by the division of mental health shall have a right to the services provided by sections

Harold P. Robb, M.D., Director

162.670 to 162.995, and shall not be denied admission to any appropriate public school or special school district program where the child actually resides because he is admitted to the program or facility provided by the division of mental health, but nothing in sections 162.670 to 162.995 shall prevent the division of mental health from providing or procuring such special educational services to such [handicapped] children. . . ."¹

The purpose of this section is twofold. First, it makes clear that a child being treated by the Department of Mental Health has the same right to special education as any other handicapped child in Missouri. In the past there has been some question as to whether a child in a Department of Mental Health facility was the sole responsibility of the Department of Mental Health for education and treatment or whether he or she was also entitled to receive benefits from local school district special programs. This section clearly resolves that question.

The other purpose of this section is to affirm that the Department of Mental Health may, in its discretion, offer educational services to handicapped children otherwise being served by the Department of Mental Health. To the extent that the Department of Mental Health has the expertise or the facilities to provide special education to some or all of its patients, it may do so. Under this section, the Department of Mental Health has two options: it can provide special educational services under the provisions of Chapter 202, RSMo, or it can procure special educational services by sending the children involved to the local school district or special school district in which the Department of Mental Health facility is located.²

¹Under state government reorganization, the functions formerly assigned to the Division of Mental Health are now assigned to the Department of Mental Health. Section 9, S.B. 1, Seventy-seventh General Assembly, First Extra Session (1974).

²Because it is not involved in your question, we offer no opinion concerning the authority of the Department of Mental Health to enter into contracts with public or private agencies for special educational services for the Department's patients.

Harold P. Robb, M.D., Director

After the Department of Mental Health "provides or procures" special educational services to handicapped children pursuant to Section 162.970, it must charge the school district of residence of the child's parent or guardian an amount equal to the local tax effort per child of that district, according to the remainder of Section 162.970, which reads as follows:

"1. . . . The school district, except school districts which are a part of a special school district, or the special school district of residence of the parent or guardian of every handicapped child for whom special educational services are provided or procured by the division of mental health, or the district which would otherwise be responsible for providing gratuitous education for such child, shall be responsible for per pupil costs for special education services for such child in an amount not to exceed the average sum produced per child by the local tax effort of the district.

"2. Failure of a district to pay such amount to the division of mental health within ninety days after a bill is submitted by the division shall result in deduction of the amount due by the state board of education from subsequent payments of any state financial aid due such district and in the payment by the state board of education to the director of mental health of the amount deducted."

This section clearly anticipates that the financial burden of providing special educational services shall rest on the district in which the parent or guardian of the child lives and not on the district which by historical accident happens to contain a Department of Mental Health facility. Therefore, when the services have been procured by the Department of Mental Health from the local school district or special school district, the Department of Mental Health shall make a payment to the district equal to the amount it has collected from the school district of residence of the parent or guardian.

The amounts received by the Department of Mental Health from the districts of the parents' residence under this procedure must be placed in general revenue. Missouri Constitution, Article III, Section 36. Therefore, the Depart-

Harold P. Robb, M.D., Director

ment of Mental Health will need an appropriation from the legislature for the total cost of the services it provides and for the amount it must pay the various local districts educating handicapped Department of Mental Health patients.

With regard to "severely handicapped" children, Section 162.725 provides that the State Board of Education shall provide special educational services, except for children residing in special school districts who are the responsibility of the special district. These services may either be provided by a school operated by the State Board or the special district, Sections 162.725, 162.730, or they may be provided under contract "with another public agency or with a private agency." Sections 162.735, 162.750.

The Department of Mental Health is a public agency with the authority to provide educational services, Section 202.020, RSMo 1969, and therefore the State Board of Education may discharge its responsibility for education by entering into contracts with the Department of Mental Health for the education of severely handicapped children. The contract should provide for the payment by the State Board of Education to the Department of Mental Health for the value of the services. However, as explained above, the money received by the Department of Mental Health must be paid into general revenue, and the Department of Mental Health will need an appropriation of its own to expend money for educational services provided under contract to the State Board of Education.

Since neither Section 162.735 nor 162.970 is limited to in-patients of state mental health facilities, the authority of the Department of Mental Health to educate includes both in-patients and out-patients of mental health facilities.

The decision as to which handicapped and severely handicapped children the Department of Mental Health should educate is one which the Department of Mental Health itself must make, taking into account the special needs of the children and the expertise of the Department of Mental Health. The general policy of the statute favors keeping children in the mainstream of the educational process as much as possible. Section 162.680. However, where a child needs educational services which can best be supplied by the Department of Mental Health, the Department of Mental Health should exercise its powers and offer those services.

Harold P. Robb, M.D., Director

2.

The second and third questions in your request deal with the problem of transporting children to educational services provided under contract to the State Board of Education. Section 162.755 provides with regard to this transportation as follows:

"The state board of education shall provide reasonable transportation for children who attend day schools or programs operated by the board, and the state board of education may provide transportation for children who receive special educational services in other state-operated schools or in programs operated through contract by the state board of education as provided in section 162.735."

A lawsuit is currently pending to determine the extent of the duty this section gives to the State Board of Education to provide transportation. Brooks v. State Board of Education of Missouri, Civ.No. 74-819C (1) (E.D.Mo., filed 11/21/74). We offer no opinion on the merits of that suit. Your questions ask only about the discretionary powers of the Department of Mental Health to provide such transportation on its own.

The children involved in your request are all on the Department of Mental Health's caseload on an out-patient basis. Some of them are in foster homes, while others live with their natural parents. Most of the children receive educational services in private facilities, but some attend programs of the Department of Mental Health. The State Board of Education has not been appropriated sufficient funds for fiscal year 1975 to furnish transportation for a number of these children, and you inquire whether either state community patient placement funds or federal funds received under the Developmental Disability Act may be used for this purpose.

To determine the authority of the Department of Mental Health to provide transportation services, we must turn to the general statute defining the powers of the department, Section 202.020, RSMo 1969, which reads as follows:

"1. The division of mental health of the state department of public health and

Harold P. Robb, M.D., Director

welfare shall provide appropriate full or part-time resident or outpatient care and treatment, examination and report, education and training of persons suffering from mental illness or mental retardation, and shall have the administrative control of the following facilities:
[here follows a list of facilities] . . .

"2. With the approval of the department of public health and welfare, the division of mental health shall make all necessary orders for the government, administration, discipline and management of all such facilities."

The statute which establishes institutions for the mentally retarded similarly authorizes "all necessary orders for [the] . . . operation, administration, and management" of those institutions. Section 202.591, RSMo 1973 Supp. We believe that the furnishing of transportation for patients is a "necessary order" within those statutes if the transportation enables the patients to obtain one of the enumerated services, whether or not the service itself is furnished by the Department of Mental Health. Thus, the Department of Mental Health may use state funds to provide such transportation to educational programs offered by private or public agencies under contract to the State Board of Education, as well as transportation for handicapped and severely handicapped children in special education programs provided by the Department of Mental Health under the provisions of Chapter 202 or Section 162.970 and for Department of Mental Health patients attending public school special education programs. In most of these cases, the school district or other educational agency has a statutory duty to provide this transportation, but the Department of Mental Health may provide transportation on its own if it wishes, although it is not required to do so.

3.

Your third question deals with the use of federal developmental disability money for special education transportation services. This money arises under the "Developmental Disability Services and Facilities Construction Amendments of 1970," 42 U.S.C., Sections 2670-2677c, which was enacted as Title I of P.L. 91-517. The first section of this law provides as follows:

Harold P. Robb, M.D., Director

"The purpose of this part [42 USCS §§ 2670-2677c] is to authorize --

"(a) grants to assist the several States in developing and implementing a comprehensive and continuing plan for meeting the current and future needs for services to persons with developmental disabilities;

"(b) grants to assist public or nonprofit private agencies in the construction of facilities for the provision of services to persons with developmental disabilities, including facilities for any of the purposes stated in this section;

"(c) grants for provision of services to persons with developmental disabilities, including costs of operation, staffing, and maintenance of facilities for persons with developmental disabilities;

"(d) grants for State or local planning, administration, or technical assistance relating to services and facilities for persons with developmental disabilities;

"(e) grants for training of specialized personnel needed for the provision of services for persons with developmental disabilities, or research related thereto; and

"(f) grants for developing or demonstrating new or improved techniques for the provision of services for persons with developmental disabilities."

The regulations of the United States Department of Health, Education and Welfare which were promulgated to implement this statute appear at 45 C.F.R., Part 416. Section 416.2 includes as a "developmental disability" a disability which "is attributable to (i) mental retardation, cerebral palsy, or epilepsy; . . ." Section 416.2 (d). "Services for persons with developmental disabilities" includes, among others, education and "transportation services necessary to assure delivery of services

Harold P. Robb, M.D., Director

to persons with developmental disabilities." Section 416.2 (n). Therefore, the furnishing of transportation to developmentally disabled children to enable them to receive special educational services would be within the scope of the developmental disability program. Transportation of children whose handicaps are not within the definition of developmental disability would not be authorized under this federal program.

The actual allocation of federal developmental disability money is within the discretion of the Governor's Advisory Council on Mental Retardation and Other Developmental Disabilities, which was created by an Executive Order on July 16, 1971, and must be made according to the Missouri State Plan for Developmental Disabilities, filed pursuant to 45 C.F.R., Part 416. Under this plan the State Board of Education could apply for a grant for transportation purposes. The determination of whether any particular application is to be funded or not is up to the discretion of the Governor's Council, and we offer no opinion as to whether this specific proposal would be an appropriate priority expenditure. However, a request for the remainder of the current fiscal year to help start up a transportation program under the new special education law would be the type of project contemplated by this statutory scheme.

CONCLUSION

It is the opinion of this office that:

(1) Sections 162.670 et seq., RSMo Supp. 1973, give responsibility for providing special educational services for all handicapped and severely handicapped children to local school districts, special school districts and the State Board of Education. The Department of Mental Health has the duty to assure that children in its programs are receiving special educational services, either by providing them under the provisions of Chapter 202, RSMo, or by procuring them from the responsible educational agency;

(2) The Department of Mental Health may use state-appropriated funds to provide transportation for its patients to and from special educational programs, whether those programs are provided by the Department of Mental Health itself, by a school district or special school district, by the State Board of Education, or by a public or private agency under contract; and

Harold P. Robb, M.D., Director

(3) Federal developmental disability funds may be used, with the approval of the Governor's Council on Mental Retardation and Other Developmental Disabilities, for the transportation of developmentally disabled students to and from special education programs for the handicapped and severely handicapped.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Richard E. Vodra.

Very truly yours,

A handwritten signature in cursive script, reading "John C. Danforth".

JOHN C. DANFORTH
Attorney General



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

September 16, 1974

OPINION LETTER NO. 292

Honorable Larry R. Marshall
State Senator, 19th District
32 North 8th Street
Columbia, Missouri 65201

Dear Senator Marshall:

This letter is in response to your question asking:

"On July 1, 1974 Reorganization transferred the employees of the Missouri Crippled Children's Services from the University of Missouri to the Department of Social Services. As employees of the University they could qualify for a tax sheltered annuity. The Department of Social Services does not meet this qualification. Employees, especially those with long tenure could lose \$60.00 - \$70.00 per month because of the transfer. Is there anything that can be done to prevent this?"

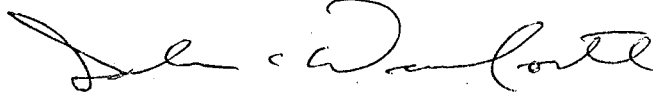
It is our understanding that since the right to tax sheltered annuities is provided under federal law the matter depends upon the provisions in the federal statutes.

The University of Missouri falls within the federal tax statutes as an exempt educational institution. However, employees of the state generally, including those within the Department of Social Services, do not have the benefit of the annuity exemptions. See, Title 26, U.S.C.A. §403(b).

Honorable Larry R. Marshall

In the absence of a change in the federal law, it appears the only way the state legislature can bring such state employees within the sheltered annuities of the federal tax laws is to transfer such employees to educational institutions which qualify.

Very truly yours,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH
Attorney General



OFFICES OF THE

JOHN C. DANFORTH
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

September 5, 1974

OPINION LETTER NO. 297

Honorable James C. Kirkpatrick
Secretary of State
State of Missouri
Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Kirkpatrick:

Pursuant to your request we submit the following ballot title for act submitted by initiative petition for campaign spending reform:

"Provides for a new campaign financing and election law to replace portions of the present corrupt practices act; limits contributions and expenditures in elections for public office; requires reporting of such contributions and expenditures; requires disclosure of economic interests of a candidate and his family, and gifts and income received by a candidate or his family; creates a bipartisan election commission to administer the act; provides penalties for violations."

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written over a horizontal line.

JOHN C. DANFORTH
Attorney General

September 16, 1974

OPINION LETTER NO. 298
Charles B. Blackmar



Mr. William R. Kostman
Commissioner of Finance
Division of Finance
Post Office Box 716
Jefferson City, Missouri 65101

Dear Mr. Kostman:

This letter is issued in response to your request in which you ask:

"Are Sections 362.380 and 408.030, RSMo 1969, unconstitutional in light of Article III, Section 44 of the 1945 Missouri Constitution."

It is our belief that they are not unconstitutional.

Section 408.030, RSMo, is the basic interest statute, allowing individuals to contract for interest at a rate not in excess of eight percent per annum.

Section 362.380, RSMo, applies only to banks and trust companies which are members of the federal reserve system, and allows them to charge interest at a rate of eight percent per annum. This section also provides as follows:

". . . the interest may be taken in advance, reckoning the days from which the note, bill or evidence of debt has to run."

Section 362.380 also provides sanctions for violations.

Article III, Section 44 of the Missouri Constitution provides as follows:

Mr. William R. Kostman

"No law shall be valid fixing rates of interest or return for the loan or use of money, . . . for any particular group or class engaged in lending money. The rates of interest fixed by law shall be applicable generally and to all lenders without regard to the type or classification of their business."

We perceive no constitutional violation on the face of the Missouri statutes set out above. It is true that Section 362.380 applies only to certain banks and trust companies, but it does not permit these institutions to charge interest at rates which do not apply to other lenders. We do not consider that the provision for collection of interest in advance is a material variation. Therefore, we do not believe it is necessary to determine whether other lenders can collect interest in advance. In any event, banks and trust companies would remain subject to the general law, if the special statutory provisions applicable to them were held to be invalid. Nor does Section 44 of Article III of the Missouri Constitution preclude the imposition of sanctions against some lenders which do not apply to others. It applies solely to rates of interest, and not to sanctions.

We are aware of the contention that Sections 362.380 and 408.030 are rendered invalid by reason of 12 U.S.C. §85, which permits national banks to charge interest at a rate referable to the discount rate prescribed by the federal reserve bank for the area. We are aware of the fact that this rate may exceed eight percent, so that national banks located in Missouri may be authorized to charge interest at rates which would not be permitted to other lenders. We do not believe that this circumstance has the effect of rendering otherwise valid state statutes invalid.

Congress has the power to establish national banks in the exercise of its delegated powers over currency, commerce and otherwise. This has been recognized since the landmark case of McCulloch v. Maryland, 4 Wheat. 316 (1819). In the exercise of this power Congress undoubtedly has the power to prescribe the interest rates which may be charged by institutions of its own creation, and to supersede conflicting provisions of state law under the Supremacy Clause. (Article VI, Section 2, United States Constitution).

However, Article III, Section 44 of the Missouri Constitution is directed solely at the state legislature. The state legislature is told that it may not authorize special interest rates for particular classes of lenders. It has not done so in enacting

Mr. William R. Kostman

Sections 362.380 and 408.030. If there is a lack of uniformity of interest rates, this is because of the action of the United States Congress which the state has no power to prevent. We do not believe that the intent or purpose of Article III, Section 44 was to oust the state of the power to regulate interest rates, if rates at variance with the state standard are prescribed by supervening federal authority. Article III, Section 44 does not say that all rates must be equal for all classes of lender. It simply says that the legislature must not take any action which fosters inequality.

Very truly yours,

JOHN C. DANFORTH
Attorney General

September 27, 1974

OPINION LETTER NO. 301
Answer by Letter - Nowotny

Mr. Robert L. James
Commissioner
Office of Administration
Room 120, State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. James:

This is in response to your request for an opinion concerning whether any state departments or agencies are exempt from regulations established pursuant to Section 33.090, RSMo 1969. You state that certain state departments and agencies, as well as the legislative and judicial branches, have from time to time questioned or claimed that they were not subject to regulations established pursuant to this law. More specifically, you state that they question having prior approval of out state travel as required by Rule 8(a) of the travel regulations.

In Opinion No. 3, 1955, Atterbury, we reviewed and approved certain forms for expense accounts for state officers and employees proposed by the Division of Comptroller and Budget. We held that such forms are in the public interest and are a necessary aid to the comptroller and state auditor in performance of their duties relating to such expenditures and should be adopted by the Division.

Of course, the duties of the comptroller are now given to the Commissioner of Administration. Section 26.300, RSMo Supp. 1973.

In writing the above-referenced opinion we first cited various provisions of the Comptroller's Law, Chapter 33, in determining the general duties of the comptroller for approving,

Mr. Robert L. James

preapproving and certifying expenditures from the state treasury. In reviewing these statutes, we stated in Opinion No. 3:

"We have observed from the sections herein-above noted that the comptroller shall pre-approve all claims and accounts submitted to him before certifying the same to the state auditor for payment; that the comptroller shall ascertain that such claims and accounts are regular and correct, and that every official and employee of the state who shall make any such expenditure without first securing the certifications of the comptroller and the auditor is subject to personal liability.

"The provisions contained in the above-noted sections refer primarily, we may assume to the certification and approval of purchases by various departments, but since there is no exception made of the certification and approval of travel expense accounts incurred, requiring the payment of money, in obligations required to be so certified and approved, we believe such provisions apply in like measure and with like effect, to such obligations as maintenance and expense accounts of state officers and employees in the performance of services for the state at places outside the town of their residence and official domicile where they are authorized by law to perform such services."

This opinion was written concerning the travel regulations at that time as well as the forms for making up monthly expense accounts. Accordingly, we found that there was authority for the forms and regulations for approval and preapproval of expense accounts.

Your question is whether these regulations can be made to apply under the statute to all state departments and agencies. We have reviewed Chapter 33 and do not find any exception to the operation of this chapter and, in particular, Section 33.090 concerning travel regulations, and Sections 33.030 and 33.040 concerning the comptroller's duties and powers to approve, pre-approve, and certify expenditures for payment. Nor, are we aware of any provisions in any other law exempting any department, agency, the legislature, or the state courts, from the operation

Mr. Robert L. James

of these laws. Accordingly, it is our opinion that state departments and agencies, the legislature, and the judiciary, are not exempt from regulations established pursuant to Section 33.090.

Very truly yours,

JOHN C. DANFORTH
Attorney General

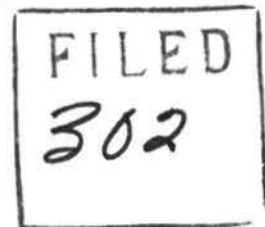
CONSTITUTIONAL LAW:
SCHOOLS:
BONDS:
TAXATION (SCHOOLS):

Neither the Missouri Constitution nor the United States Constitution forbids the two-thirds majority needed for tax and bond elections under Article X, Section 11 (c) and Article VI, Section 26 (b) of the Missouri Constitution.

September 17, 1974

OPINION NO. 302

Dr. Arthur L. Mallory
Commissioner of Education
Jefferson Office Building
Jefferson City, Missouri 65101



Dear Dr. Mallory:

This letter is in response to your request for an opinion. In the request, you have asked the following questions:

"1. Is that provision of Section 11(c), Article X of the Missouri Constitution that requires certain tax rate proposals to receive a two-thirds majority vote to become effective in conflict with any other provision of the Missouri Constitution relating to this subject or any provision of the United States Constitution?

"2. Is that provision of Section 26(b), Article VI of the Missouri Constitution that requires bond proposals to receive a two-thirds majority vote to authorize issuance of the bonds in conflict with any other provision of the Missouri Constitution or any provision of the United States Constitution?"

It is the opinion of this office that two recent cases concisely state the law as it concerns that part of your question dealing with the United States Constitution. Brenner v. School District of Kansas City, Missouri, 315 F.Supp. 627 (D.C.Mo. 1970), deals specifically with the Missouri provisions for bond and tax elections. That case holds:

Dr. Arthur L. Mallory

"... that there is nothing in the Constitution or any of its Amendments which prohibits Missouri from establishing and maintaining its two thirds majority requirement for its school referendum elections." Id. at 642.

Gordon v. Lance, 403 U.S. 1, 91 S.Ct. 1889, 29 L.Ed.2d 273 (1971), also concerns the applicability of the United States Constitution to greater than majority requirements in a referendum election. Specifically, West Virginia's statute dealing with a sixty percent approval rate required for incurring bonded indebtedness or increasing tax rates was at issue. The Supreme Court held that the West Virginia law did not violate the one-man, one-vote rule of the Equal Protection Clause of the Fourteenth Amendment.

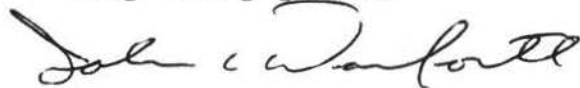
The Missouri Constitution, Article I, Section 2, states "... that all persons are created equal and are entitled to equal rights and opportunity under the law. . . ." There is no decisional law directly applying this provision to the tax and bond election requirements. However, King v. Swenson, 423 S.W.2d 699 (Mo.Banc 1968), states that "the general purpose of these federal and state provisions is to prevent invidious discrimination. Statutory classification does not violate constitutional limitation if all persons in the same class are treated with equality." Thus, the standards for the state are similar, if not the same, as those for the United States Constitution.

CONCLUSION

It is the opinion of this office that neither the Missouri Constitution nor the United States Constitution forbids the two-thirds majority needed for tax and bond elections under Article X, Section 11 (c) and Article VI, Section 26 (b) of the Missouri Constitution.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Robert H. House.

Very truly yours,



JOHN C. DANFORTH
Attorney General

October 28, 1974

OPINION LETTER NO. 303

Answer by Letter - Burns

Honorable Garnett A. Kelly
State Representative, District 143
Rural Route 2
Norwood, Missouri 65717

FILED
303

Dear Representative Kelly:

This letter is in response to your question asking whether sheriffs in third and fourth class counties are, under provisions of Senate Bill No. 378 of the 77th General Assembly, entitled to fifteen cents per mile for serving civil process as provided in Section 57.280 and fifteen cents per mile for travel in serving certain criminal process and making investigations of persons accused of or convicted of criminal offenses as provided in Section 57.430.

House Committee Substitute for Senate Bill No. 378 of the Second Regular Session of the 77th General Assembly, effective August 13, 1974, repealed six sections of the Missouri statutes and reenacted six new sections relating to the same subject.

Section 57.280 of Senate Bill No. 378, provides in part, as follows:

"Fees of sheriffs shall be allowed for their services as follows:

* * *

"For each mile actually traveled in serving any venire summons, writ, subpoena or other order of court when served more than five miles from the place where the court is held, provided that such mileage shall

Honorable Garnett A. Kelly

not be charged for more than one witness
subpoenaed or venire summons or other writ
served in the same cause on the same trip.
.15"

This fee, that is, the fifteen cents per mile provided for in serving civil process, is by virtue of Sections 57.407 and 57.409, RSMo, retained by the sheriff in third and fourth class counties, as part of his compensation and is not paid, as are other fees, into the county treasury.

Such fee constitutes compensation to the sheriff. It is therefore our view that such sheriffs during their present terms of office are not entitled to the increase from ten cents per mile, as provided for prior to the effective date of Senate Bill No. 378, to fifteen cents per mile because of the provisions of Section 13 of Article VII of the Constitution of Missouri providing that the compensation of no officer shall be increased during his term of office. See, State ex rel. Emmons v. Farmer, 196 S.W. 1106 (Mo. Banc 1917).

You also inquire as to the provisions of Section 57.430(1) of Senate Bill No. 378. Such section provides as follows:

"1. In addition to the salary provided in sections 57.390 and 57.400, the county court shall allow the sheriffs and their deputies, payable at the end of each month out of the county treasury, actual and necessary expenses for each mile traveled in serving warrants or any other criminal process not to exceed fifteen cents per mile, and actual expenses not to exceed fifteen cents per mile for each mile traveled, the maximum amount allowable to be three hundred dollars during any one calendar month in the performance of their official duties in connection with the investigation of persons accused of or convicted of a criminal offense. When mileage is allowed, it shall be computed from the place where court is usually held, and when court is usually held at one or more places, such mileage shall be computed from the place from which the sheriff or deputy sheriff travels in performing any service. When two or more persons who are summoned, subpoenaed, or

Honorable Garnett A. Kelly

served with any process, writ, or notice, in the same action, live in the same general direction, mileage shall be allowed only for summoning, subpoenaing or serving of the most remote."

Such section formerly provided for a payment not to exceed ten cents per mile for actual and necessary expenses for each mile traveled in serving warrants or any other criminal process and actual expense not to exceed ten cents per mile for each mile traveled in the performance of their official duties in connection with the investigation of persons accused of or convicted of a criminal offense with a maximum payable of two hundred dollars per month. Senate Bill No. 378 increased this mileage allowance amount to fifteen cents per mile.

Section 57.430 does not provide for mandatory payment of fifteen cents per mile. The statute provides for allowances for reimbursable expenses payable to the sheriff in addition to his salary. These allowances are for "actual and necessary expenses . . . not to exceed fifteen cents per mile." This mileage allowance does not constitute compensation and an increase in such mileage allowance is not prohibited during the term of office by provisions of Section 13, Article VII of the Missouri Constitution. As a general rule, significance and effect must be given to every word and phrase of a statute. 73 Am.Jur.2d Statutes §250 (1974); Burrow v. Finch, 431 F.2d 486 (8th Cir. 1970); Pryor v. David, 436 S.W.2d 3 (Mo. 1969); State v. Ralston Purina Co., 358 S.W.2d 772 (Mo. Banc 1962). Interpreting Section 57.430, V.A.M.S., to require payment of fifteen cents per mile for each mile traveled in serving warrants or other criminal process and for each mile in performance of investigatory work would require ignoring the words "actual and necessary expenses" and "not to exceed." Thus, while fifteen cents per mile may be paid, Section 57.430 mandates only an allowance for actual and necessary expenses not in excess of fifteen cents per mile.

Very truly yours,

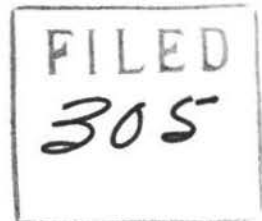
JOHN C. DANFORTH
Attorney General

JUDGES: A magistrate judge over the age of
PENSIONS: sixty-five who has served as a mag-
MAGISTRATES: istrate judge or as a justice of
RETIREMENT: the peace in the state of Missouri
for a period of time totaling an
aggregate of twelve years and who after September 28, 1971 ceases
to hold his office as magistrate judge by voluntary resignation
is entitled to retirement pay equal to fifty percent of the com-
pensation provided by law at the time of his retirement for the
judges of the highest court the retired judge served as a full-
time judge, to be paid monthly during the remainder of his life,
said compensation to begin from the date of his resignation as
magistrate judge.

OPINION NO. 305
AMENDED January 28, 1975

September 17, 1974

Honorable Omar Schnatmeier
State Representative, District 52
1901 Elm Street
St. Charles, Missouri 63301



Dear Representative Schnatmeier:

This is in response to your request for an opinion from this
office as follows:

"Is a magistrate judge over the age of 65
years, who has served as Magistrate Judge
for less than twelve years but has served
the State of Missouri as a judge for more
than twelve years when including his prior
service as Justice of the Peace, entitled
to retirement compensation under Section
476.530 RSMo, equal to 50 percent of his
compensation at the time of resignation
if he resigns before completing his pres-
ent term of office? If so, when does his
right to said compensation begin?"

Sections 476.515 to 476.570, RSMo Supp. 1973, provides for
the retirement of judges under certain conditions as provided
for therein.

Section 476.515, provides in part, as follows:

"(4) 'Judge', any person who has served or is serving as a judge or commissioner of the supreme court or of the court of appeals, or as a judge of any circuit court, probate court, magistrate court, court of common pleas or court of criminal corrections of this state or as a justice of the peace;"

Under the above statutory provision, the judge under these statutory provisions includes a person who has served as a magistrate judge or as a justice of the peace in the state of Missouri.

Section 476.520, RSMo Supp. 1973, provides as follows:

"Any person, sixty-five years of age or older, who has served in this state an aggregate of twelve years, continuously or otherwise, as a judge, and who, after September 3, 1970, ceased or ceases to hold office by reason of the expiration of his term, voluntary resignation, or retirement under the provisions of subsection 2 of section 27 of article V of the Constitution of Missouri may receive benefits as provided in sections 476.515 to 476.570. All judges required by the provisions of section 30 of article V of the constitution to retire at the age of seventy years shall retire upon reaching that age, and if they have served in this state an aggregate of twelve years, continuously or otherwise, as a judge, shall receive benefits as provided in sections 476.515 to 476.570. The twelve years requirement of this section may be fulfilled by service as judge in any of the courts covered, or by service in any combination as judge of such courts, totaling an aggregate of twelve years." (Emphasis supplied).

The reference in such section to judges who ceased or cease to hold office after September 3, 1970 was held in Opinion No. 419-1974, copy enclosed, to be invalid. The section is applicable to judges who ceased or cease to hold office after September 28, 1971, the effective date of Section 476.520, RSMo Supp. 1973.

Under the above statute, the twelve years requirement is fulfilled by service as a judge of the magistrate court or as a justice of the peace for a period totaling an aggregate of twelve years.

Honorable Omar Schnatmeier

Section 476.530, RSMo Supp. 1973, provides as follows:

"The retirement compensation shall be equal to fifty percent of the compensation provided by law at the time of retirement for the judges of the highest court on which the retired judge served as a full-time judge. Retirement compensation shall be paid to the retired judge monthly during the remainder of his life."

Under the above statutory provisions, a magistrate judge who is otherwise eligible to retire under these statutory provisions and resigns during his term is entitled to retirement compensation equal to fifty percent of the compensation provided by law at the time of retirement to be paid monthly during the remainder of his life.

CONCLUSION

It is the opinion of this office that a magistrate judge over the age of sixty-five who has served as a magistrate judge or as a justice of the peace in the state of Missouri for a period of time totaling an aggregate of twelve years and who after September 28, 1971 ceases to hold his office as magistrate judge by voluntary resignation is entitled to retirement pay equal to fifty percent of the compensation provided by law at the time of his retirement for the judges of the highest court the retired judge served as a full-time judge, to be paid monthly during the remainder of his life, said compensation to begin from the date of his resignation as magistrate judge.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Very truly yours,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 419
10/28/71, Vaughn



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

JOHN C. DANFORTH
ATTORNEY GENERAL

November 21, 1974

OPINION LETTER NO. 306

Honorable Frank G. Mack
Prosecuting Attorney
Iron County
124 West Russell
Ironton, Missouri 63650

Dear Mr. Mack:

This letter is in response to your question asking:

"1. Is it mandatory that the County Court distribute funds received under the Forest Reserve Act to school districts lying adjacent to National Forest in the County?

"2. If in the affirmative, is there any mandatory formula for distribution of said monies lying adjacent to National Forest in the County?"

You further state that:

"Iron County has four school districts situated in the County, three districts have National Forest land within its boundaries. The fourth district, which is South Iron, has no National Forest wholly or partly within its boundaries, however, the South Iron boundary lies adjacent to approximately 12 miles of National Forest land.

"In the past the County Court has distributed the monies to only three of the districts which had National Forest land within

Honorable Frank G. Mack

its boundaries and the distribution was based upon an acreage formula.

"South Iron School District has made a request and threatened litigation that they are entitled to a portion of the National Forest monies pursuant to Section 12.070 on the basis that: The funds shall be used to aid in maintaining the schools and roads of its school districts that lie or are situated partly or wholly within or adjacent to the National Forest in the County."

Section 12.070, RSMo, to which you refer, provides:

"All sums of money received from the United States under an act of congress, approved May 23, 1908, being an act providing for the payment to the states of twenty-five percent of all money received from the national forest reserves in the states to be expended as the legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which the forest reserve is situated (16 U.S.C.A. §500) shall be expended as follows: Seventy-five percent for the public schools and twenty-five percent for roads in the counties in which national forests are situated. The funds shall be used to aid in maintaining the schools and roads of those school districts that lie or are situated partly or wholly within or adjacent to the national forest in the county. The distribution to each county from the proceeds received on account of a national forest within its boundaries shall be in the proportion that the area of the national forest in the county bears to the total area of the forest in the state, as of June thirtieth of the fiscal year for which the money is received."

In our Opinion No. 77, dated February 4, 1969, to Bergbauer, copy enclosed, this office held that the county court of any county receiving funds from the United States under the National Forest Reserve Act shall distribute such funds to aid in maintaining the

Honorable Frank G. Mack

schools and roads of school districts that lie or are situated partly or wholly within or adjacent to the national forest in the county upon any basis which, in its discretion, the court determines to be proper. We also held in that opinion that Section 12.070 does not require that the county court distribute the money on an acreage basis and that no formula for the distribution of such funds has been prescribed.

The views expressed in Opinion No. 77 are supported by the holding in Trinity Independent School Dist. v. Walker County, 287 S.W.2d 717 (Tex.Civ.App. 1956). In that case the court held that the federal act did not evidence an intention on the part of Congress to make payments in lieu of taxes, but rather a friendly purpose to create trusts for the benefit of counties in which national forests are located in recognition of the national interest in education and road building. We note also that the court held that the Texas statute does not restrict the allocation to school districts containing federal forest land. The same is true here because Section 12.070 clearly provides that "[t]he funds shall be used to aid in maintaining the schools and roads of those school districts that lie or are situated partly or wholly within or adjacent to the national forest in the county."

In a similar situation the United States Supreme Court in King County v. Seattle School District No. 1, 263 U.S. 361, 68 L.Ed 339, 44 S.Ct. 127 (1923), held that the language of the federal act indicates an intention on the part of the Congress that the state in its discretion may prescribe by legislation how the money is to be expended. The court further held that no trust is created on behalf of the school district because of the federal grant and even assuming that such moneys are charged with a trust by the federal law the school district had no right to enforce the trust under federal law.

Regardless of whether a trust is or is not created, the question narrows to whether, in the premises, the adjoining school district has a right to any funds. Section 12.070 with respect to such distribution uses the word "shall" which is generally mandatory but no mandate is given to the county courts respecting a method of distribution. It appears in the premises that it is questionable whether the school district has a legally enforceable claim to any funds. At the same time, as indicated by the United States Supreme Court in the King County case, there is a sacred obligation imposed on the use of such funds. We therefore conclude that Section 12.070 imposes on the county court an

Honorable Frank G. Mack

obligation to make a fair distribution of such funds to such school districts and roads. We assume that the members of the county court as public officers will perform the obligations imposed upon them by law in an appropriate manner.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 77
2/4/69, Bergbauer



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

October 8, 1974

OPINION LETTER NO. 307

Honorable Ed Bohl
Representative, District 115
Box 325
Harrisonville, Missouri 64701

Dear Representative Bohl:

This letter is in answer to your question asking:

"When the electronic voting system as provided for in 111.291 to 111.331, RSMo. is used at an election and a ballot envelope is used for enclosing the computer ballot card as well as for write-in candidates, does the printing on the ballot envelope of the name of a county official who also is a candidate on the ballot in that election violate the provisions of Section 111.341, RSMo. pertaining to the contents and form of the ballots as well as Sections 129.730 and 129.840, RSMo. relating to electioneering at the polls?"

You further state that:

"The ballot envelope currently being used in Cass County for enclosing the computer ballot card as well as for write-in votes has printed on the outside and clearly visible to each voter the following: 'OFFICIAL BALLOT'; 'County of Cass, State of Missouri'; 'RUSSELL WERNEX County Clerk'; 'Judge'. (A copy of the ballot envelope is attached for reference.) At the same election in which this ballot envelope was (and will be) used, Mr. Russell Wernex is a candidate for the office of County Clerk."

Honorable Ed Bohl

Your question is whether or not the placing of such name as indicated constitutes "electioneering" within the prohibition of Sections 129.730 or 129.840, RSMo. Penal statutes must be strictly construed, which means that they will not be regarded as including anything not clearly and intelligibly described in the words thereof, and manifestly intended by the legislature. State ex inf. Collins v. St. Louis & S. F. R. Co., 142 S.W. 279 (Mo. 1911). In these premises we do not believe that there is a violation of Sections 129.730 or 129.840.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

BALLOTS: Ballot cards used in an electronic
ELECTIONS: voting machine should be initialed
ELECTION JUDGES: by two judges of opposite politics.
VOTING MACHINES: However, if ballots are cast which
are not initialed by the election
judges, such ballots are to be counted if otherwise in compliance with legal requirements.

OPINION NO. 308

October 23, 1974

Honorable Ed Bohl
Representative, District 115
Box 325
Harrisonville, Missouri 64701

Dear Representative Bohl:

This is in response to your request for an opinion from this office as follows:

"When the electronic voting system as provided for in Sections 111.291 to 111.331, RSMo. is used at an election, must the initials of two judges of opposite politics be written on the back of the ballot card in order for the ballot to be valid?"

Section 111.301, RSMo Supp. 1973, provides in part as follows:

"1. Electronic voting systems may be used in any election if such systems enable the voter to cast a vote in secrecy for all offices and on all measures on which he is entitled to vote, and if the automatic tabulating equipment may be set to reject all votes for any office or measure when the number of votes therefor exceeds the number which the voter is entitled to cast, or when the voter is not by law entitled to cast a vote for the office or measure.

"2. Electronic voting systems may be used at any primary election if the automatic tabulating equipment will count only votes for the candidates of one party, and will

Honorable Ed Bohl

reject all votes for an office when the number of votes therefor exceeds the number which the voter is entitled to cast and will reject all votes of a voter cast for candidates of more than one party.

"3. So far as applicable, the procedure provided for voting paper ballots shall apply except that no requirement regarding the placement of the voter's identification number nor the covering thereof with a black sticker on the back of the ballot card shall be applicable."

Subdivision 3 of the above statute provides that the procedure for voting paper ballots shall apply so far as applicable except there shall be no requirement regarding the placement of the voter's identification number nor the covering thereof with a black sticker on the back of the ballot card.

Section 111.291, RSMo Supp. 1973, provides for ballot cards to be used in electronic voting systems.

Since the procedure provided for voting paper ballots so far as applicable shall apply to the electronic voting system, it is necessary to determine the procedure to be followed for using paper ballots when electronic system for voting is not used.

Section 111.441, RSMo, provides in part as follows:

"1. On any day of election any person desiring to vote shall give his name and, if required to do so, his residence to the judges of election, one of whom shall thereupon repeat the name in a distinct tone of voice, clear and audible. Where there is a registration of voters if the name is found in the register of voters by the officer having charge thereof, he shall likewise repeat the name and the voter shall be allowed to enter the space enclosed by the guard rail. When the voter's name is found on the register list, a mark shall be entered beside it to indicate that the voter has presented himself for the purpose of voting. No voter shall receive a ballot until his name is found on the register of voters.

Honorable Ed Bohl

"2. One of the judges shall then give one and only one ballot, on the back of which two judges of opposite politics have written their initials with ink or indelible pencil, to the judges in charge of the poll books prescribed by section 111.521. One of them shall enter the voter's name, in the order in which he presents himself, in the poll books and shall write the number of the line on which the name is written in the poll book on the back of the ballot. In the presence of the voter they shall then cover or conceal securely the identifying number placed on the ballot by placing over the number, and pasting down, a black sticker so as to conceal but not destroy the number placed thereon. The sticker shall be two inches square with gummed edges extending three-eighths of an inch towards the center of the square. The ballot shall then be handed to the voter to be voted as prescribed by section 111.451. If numbered ballots are used all ballots shall be delivered in consecutive order."
(Emphasis supplied)

It is our view that under the above statute it is the duty of the judges of the election to give one and only one ballot, on the back of which two judges of opposite politics have written their initials in ink or indelible pencil. It is our opinion this applies as well to ballots used in connection with use of election machines.

Since the statutes require the ballot to be initialed on the back by two judges of opposite politics, you inquire whether such ballot is valid and should be counted when not initialed.

In Kasten v. Guth, 395 S.W.2d 433 (Mo. 1965), the issue before the court was an election contest in which some ballots cast and counted did not contain the judge's or clerk's initials as provided by statute. In discussing this matter the court stated, l.c. 435:

"First, appellant urges that the returns from the Longtown District should be voided because the evidence showed that the election there was not conducted in compliance with the provisions of Section 111.620 RSMo 1959, V.A.M.S. Some of the ballots cast

Honorable Ed Bohl

and counted did not contain the Judge's or Clerk's initials and did not have black stickers placed over the numbers marked on the ballots. '* * * The uppermost question in applying statutory regulation to determine the legality of votes cast and counted is whether or not the statute itself makes a specified irregularity fatal. If so, courts enforce it to the letter. If not, courts will not be astute to make it fatal by judicial construction. Gass v. Evans, 244 Mo. [329] loc. cit. 353, 149 S.W. 628; Hehl v. Guion, 155 Mo. 76, 55 S.W. 1024. "Such a construction," says this court, speaking through Barclay, J., in Bowers v. Smith, 111 Mo. [45] loc. cit. 55, 20 S.W. 101, 16 L.R.A. 754, 33 Am.St. Rep. 491, "of a law as would permit the disfranchisement of large bodies of voters, because of an error of a single official, should never be adopted, where the language in question is fairly susceptible of any other Wells v. Stanforth (1885), 16 Q.B. Div. 245." Again (pages 61, 62, of 111 Mo., page 105 of 20 S.W. [16 L.R.A. 754, 33 Am. St.Rep. 491]): "If the law itself declares a specified irregularity to be fatal, the courts will follow that command irrespective of their views of the importance of the requirement. Ledbetter v. Hall (1876), 62 Mo. 422. In the absence of such declaration, the judiciary endeavor, as best they may, to discern whether the deviation from the prescribed forms of law had or had not so vital an influence on the proceedings as probably prevented a free and full expression of the popular will. If it had, the irregularity is held to vitiate the entire return; otherwise it is considered immaterial." Nance v. Kearbey, 251 Mo. 374, 383, 384, 158 S.W. 629, 631 [3]. See also Riefle v. Kamp, 241 Mo.App. 1151, 247 S.W.2d 333; and Bernhardt v. Long, 357 Mo. 427, 209 S.W.2d 112. Sec. 111.620, supra, does not itself make the specified irregularities fatal. The point is without merit."

Honorable Ed Bohl

The court further stated that as a general rule an election will not be annulled even if certain provisions of the law regarding elections have not been strictly followed in the absence of fraud. While the irregularities referred to in this case should not be encouraged, they are not sufficient to constitute fraud, and in the absence of fraud, the court will not deprive the voters of their votes.

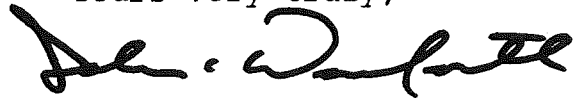
The statutes at this time regarding this matter are the same as they were when the Supreme Court decided Kasten v. Guth, supra. We find no statute at the present time which expressly states that ballots cast without the initials of the judges should not be counted.

CONCLUSION

It is the opinion of this office that ballot cards used in an electronic voting machine should be initialed by two judges of opposite politics. However, if ballots are cast which are not initialed by the election judges, such ballots are to be counted if otherwise in compliance with legal requirements.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,

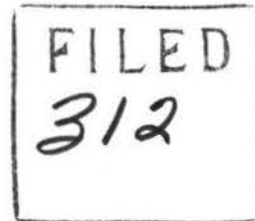
A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

September 23, 1974

OPINION LETTER NO. 312
Answer by Letter - Klaffenbach

Honorable Kenneth J. Rothman
State Representative, District 77
309 State Capitol Building
Jefferson City, Missouri 65101



Dear Representative Rothman:

This letter is in response to your question asking:

"Whether under Revised Statutes of Missouri, Section 260.200 to 260.245, a city or county may levy a charge for the collection and disposal of solid waste on a person or household which makes no use of the services provided for collection and disposal of solid wastes."

You have also stated that some cities and counties take the position that service charges can be levied irrespective of whether or not the residents desire the service. We believe that the wording of the solid waste disposal law indicates that such was the legislative intent.

Since your question deals with all counties and all cities it is somewhat difficult to give you a concise answer.

It is our understanding of the legislative intent respecting the solid waste disposal law, Sections 260.200, RSMo Supp. 1973 et seq., that, among other things, the law was intended to eliminate the practice of numerous individuals of using unorthodox and unsightly as well as unsanitary means of disposal of refuse. The prevalence of such practices had become quite visible to all concerned.

The legislature provided the following exception in Section 260.220.2(6), with respect to disposal plans:

Honorable Kenneth J. Rothman

"Every plan shall:

* * *

(6) Allow private solid waste disposal services to continue to operate in unincorporated area (sic) of counties so long as such services are operated in a manner consistent with the policies and standards established under sections 260.220 to 260.245;"

Our previous interpretation with respect to this latter provision, as well as other features of the act in question, is set forth in our Opinion No. 42-1974, copy enclosed.

In addition, in Section 260.215.3, the legislature provided:

"Any city or county may adopt ordinances, rules, regulations, or standards for the storage, collection, transportation, processing or disposal of solid wastes which shall be in conformity with the rules and regulations adopted by the board for solid waste management systems. However, nothing in sections 260.200 to 260.245 shall usurp the legal right of a city or county from adopting and enforcing local ordinances, rules, regulations, or standards for the storage, collection, transportation, processing or disposal of solid wastes equal to or more stringent than the rules or regulations adopted by the board pursuant to sections 260.200 to 260.245."

Obviously, cities had the power prior to the enactment of Sections 260.200 et seq., to provide for mandatory refuse collection.

Clearly, where a tax is levied for such service as provided for in Section 260.215 there is no more reason for distinction between taxpayers on the grounds that such taxpayers do not desire service than there is in other areas of public concern where taxes form the basis for the support of the services and where payment is not optional with the taxpayer although the use of the service in a particular case may be optional. Your question deals with service charges as opposed to taxes. However, the conclusion we reach would be reached generally on the same principles as respects taxation. That is, that in order to carry out the intent of the legislature with respect to mandatory refuse collection the cities and the counties were intended to have the authority to levy

Honorable Kenneth J. Rothman

charges on residents within their jurisdiction irrespective of whether or not such residents desired or required the service.

The only exception to this is where the service is provided by a private disposal service in unincorporated areas of the counties within the meaning of Section 260.220.2(6), above, in which case duplicate charges should not be levied by the county.

We also enclose Opinion Letter No. 63-1973, in which we held that a city could disconnect water services as a means of collecting a bill owed the city for refuse collection, and Opinion No. 12-1970, in which we noted that such collection service is for the public welfare and that it is not necessary that an individual use the service before he can be required to pay.

AMENDED November 18, 1977.

The reference in the first sentence to Opinion 63-1973, in the preceding paragraph, is no longer the law in view of the enactment of subsection 5 of Section 260.215, RSMo Supp. 1975, which provides that no city or county shall withhold or authorize the withholding of any other utility service for failure to collect the separately stated service charge.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 42-1974
Op. No. 12-1970

COMPENSATION: County assessors may receive additional
COUNTY ASSESSORS: compensation for the duties imposed on
them under Sections 53.073 and 53.074
(Senate Bill No. 373, 77th General Assembly, Second Regular Session) for the year 1974 but that such additional compensation is annual compensation payable only on a prorated basis from the effective date of the act, August 13, 1974, to the end of the year.

OPINION NO. 313

October 23, 1974

Honorable John W. Briscoe
Prosecuting Attorney
Ralls County
429 South Main Street
New London, Missouri 63459



Dear Mr. Briscoe:

This opinion is in response to your question concerning Senate Bill No. 373, 77th General Assembly, Second Regular Session, Sections 53.073 and 53.074, which became effective August 13, 1974.

Your question is as follows:

"Section 53.073 and Section 53.074 of the Missouri Revised Statutes were passed by the General Assembly in the recent session and became effective August 13, 1974, at 12:01 A.M. Section 53.073 provides certain additional duties for county assessors, regarding the providing of a list of real property transfers occurring between January 1 and September 1 of a given year to the county collector of revenue. Section 53.074 provides additional compensation to the county assessors for the duties imposed by Section 53.073. The extra duties imposed by Section 53.073 will be performed between September 1 and October 1. The list must be compiled during the first eight (8) months of the year. My question is: Does the county assessor receive the entire additional annual compensation for 1974, since the extra duties involve work covering the time beginning January 1, 1974? If the answer to the first question is affirmative, do the assessors then

Honorable John W. Briscoe

receive the additional annual compensation, prorated over the four (4) months and nineteen (19) days of the year after the bill became effective?"

Section 53.073, as amended, provides:

"Each county assessor, except in counties of the first class and counties of the second class having an assessed valuation in excess of three hundred million dollars as of January 1, 1974, shall on or before October first of each year furnish to the county collector of the revenue of his county a list of all real property transfers occurring after January first of that year and before September first of that year. The list shall contain a description of the property transferred and the name of each grantor and grantee and their addresses if known."

Section 53.074, as amended, provides:

"As compensation for the extra duties imposed by section 53.073, each assessor shall receive, in addition to all other compensation provided by law, a sum to be paid out of the county treasury to be computed as follows:

(1) In all counties with an assessed valuation of less than thirty million dollars, one thousand dollars;

(2) In all counties with an assessed valuation of thirty million dollars but less than seventy million dollars, one thousand five hundred dollars;

(3) In all counties with an assessed valuation of seventy million dollars but less than one hundred million dollars; two thousand dollars;

(4) In all counties with an assessed valuation of one hundred million dollars but less than one hundred fifty million dollars, two thousand five hundred dollars;

Honorable John W. Briscoe

(5) In all counties with an assessed valuation of one hundred fifty million dollars but less than two hundred million dollars, three thousand dollars;

(6) In all counties with an assessed valuation of two hundred million dollars but less than two hundred fifty million dollars, three thousand five hundred dollars;

(7) In all counties with an assessed valuation of two hundred fifty million dollars but less than three hundred million dollars, four thousand dollars;

(8) In all counties with an assessed valuation of three hundred million dollars but less than three hundred fifty million dollars, four thousand five hundred dollars;

(9) In all counties with an assessed valuation of three hundred fifty million dollars or more, five thousand dollars."

Article VII, Section 13 of the Constitution of Missouri, provides:

"The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

However, when new duties are imposed upon officers, additional compensation is allowable. Mooney v. County of St. Louis, 286 S.W.2d 763 (Mo. 1956). Therefore, the assessor is entitled to additional compensation for such new duties after the effective date of the act.

The difficult question, however, is whether the entire amount of such compensation is to be prorated from the effective date of the act to the end of the year or whether the increase in compensation is to be considered as an increase in the annual compensation of the assessor and prorated as annual compensation from the effective date of the act to the end of the year.

We find no cases squarely in point. However, the Supreme Court of Missouri held in State ex rel. Vossbrink v. Carpenter,

Honorable John W. Briscoe

388 S.W.2d 823 (Mo. Banc 1965) that an officer is entitled to the emoluments of his office even though he does not perform his duties. This appears to be a well-settled rule as indicated in 22A Missouri Digest Officers p. 72. Under this reasoning an officer is entitled to his statutory compensation not on the basis of whether he actually performs the functions required of him by statute but because the legislature has provided that he is entitled to such compensation. With this case in mind, we reach the conclusion that although the duties required of the assessor must be performed before October 1 of the year and, as a practical matter, cannot be completed before September 1 such duties are essentially no different than other duties which the assessor must perform for which he is paid annual compensation in monthly installments. Section 50.330, RSMo.

We therefore conclude that the increase in compensation is an increase in annual compensation. Because we view the increase as an increase in annual compensation, it is our view that the increase may be paid only for that portion of the year, prorated, from the effective date of the act until the end of the year. For instance, an assessor in a county with an assessment between thirty million and seventy million would receive payment of one hundred twenty-five dollars per month for September, October, November, and December and 19/31 of one hundred twenty-five dollars for the month of August, 1974.

In reaching this conclusion we have considered several practical factors which should be noted. It is not unusual for officers to have workload peaks throughout the year often occasioned by statutory deadlines, and as we have noted, the courts are not prone to view an officer's right to compensation on a piecework basis. In the present situation in future years, it seems apparent that the work required could begin any time after January 1 and continue to October 1. If the compensation is to be considered on a piecework basis, it appears clear that there would be substantial difficulty in determining the rights of such officers and their successors. Assessors assume office on the first day of September after their election. Section 53.010, RSMo. While 1974 is not a year involving the end of an assessor's term, it seems that any year involving a change of officers, whether because of the end of a term or otherwise, would require a determination of the amount of compensation the respective officers are entitled to under these sections. For example, if an officer took office for the first time on September 1, the work could not have been entirely completed although presumably his predecessor could have already completed all except the last entries and delivery to the collector.

Honorable John W. Briscoe

Likewise, if an officer completed and delivered the list before the October 1 deadline and left office for some reason, it is clear that his successor would have no duties to perform or that he could perform in this respect until the first day of January following. In each case hypothesized above and in others that could arise, the difficulties of proportioning the compensation on the basis of the work completed appears obvious. We do not believe that such results were contemplated by the legislature.

CONCLUSION

It is the opinion of this office that county assessors may receive additional compensation for the duties imposed on them under Sections 53.073 and 53.074 (Senate Bill No. 373, 77th General Assembly, Second Regular Session) for the year 1974 but that such additional compensation is annual compensation payable only on a prorated basis from the effective date of the act, August 13, 1974, to the end of the year.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

October 8, 1974

OPINION LETTER NO. 314

Honorable Vernon E. Bruckerhoff
Representative, District 127
Route 1
St. Mary's, Missouri 63673

Dear Representative Bruckerhoff:

This is in response to your request for an opinion from this office as follows:

"Section 245.525, RSMo. 1969. Is it legal for farmers to pasture levees in a district formed by a county court at times other than the period during overflow or high water? This section of law clearly indicates that it is unlawful to run or herd livestock upon the levee during those stated conditions. However, I would like clarification as to whether or not it is legal at any time other than specifically named in Section 245.525.

"The farmers who are the landowners in the three levee districts in Boyse Brule Bottoms own the land upon which the levee is built. They would like to graze cattle on these levees at times when it would not be harmful or destructive to the vegetation thereon. They would like to know if they can utilize this land."

Section 245.525, RSMo, provides as follows:

"It shall be unlawful for the owner of any livestock to allow the same to use and run upon any levee erected under the provisions of sections 245.285 to 245.545, or to

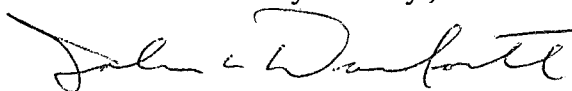
Honorable Vernon E. Bruckerhoff

herd any livestock upon said levee during overflows or high water; and whenever in the judgment of the inspectors of the levee, any livestock are likely to endanger the levee under their charge, the inspector of the section of levee where such damage is threatened shall notify the owner of such livestock liable to do such damage, and require him to remove such livestock; and every such owner who, after such notice, shall neglect or refuse to confine his or her stock, and keep them off the levees, shall pay a fine not less than twenty-five dollars nor more than one hundred dollars for each and every act of disobedience to such notice, to be recovered at the suit of the inspector or his successor in office, in any court of competent jurisdiction; and the amount recovered and collected shall be paid into the county treasury to the credit of the levee fund of the district."

Such section provides that whenever in the judgment of the inspectors of the levee any livestock are likely to endanger the levee the inspector is to notify the owner of the livestock and require him to remove such livestock; and if such owner neglects or refuses to confine and keep such livestock off the levee, the owner shall pay a fine of not less than twenty-five dollars or more than one hundred dollars for each day the fine to be recovered by suit in a court of competent jurisdiction.

Under such section it appears that landowners do not have an absolute right to graze livestock at any time but that the levee inspectors can keep landowners from grazing livestock when, in their judgment, the levee may be damaged by such grazing.

Yours very truly,



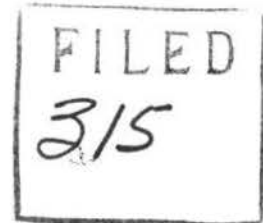
JOHN C. DANFORTH
Attorney General

ARRESTS: 1. A statement that additional
LICENSES: arrests will be made if there is
MOTOR VEHICLES: further movement on the highway
HIGHWAY PATROL: of an improperly registered com-
MOTOR VEHICLE LICENSES: mercial motor vehicle, or that
RECIPROCITY COMMISSION: further arrests subsequent to the
first arrest for movement on the
highway of an improperly registered commercial motor vehicle
will be made by members of the Missouri State Highway Patrol, as
proposed by the Missouri Highway Reciprocity Commission, is not
illegal or improper under Missouri law. 2. Such action by an
officer of the Missouri State Highway Patrol would not render
him liable to civil damages for loss of revenue or damage to the
vehicle and cargo during the period of time that the vehicle is
parked pending proper registration and payment of proper fees.
3. Any delay in movement of the goods contained in the improv-
erly registered commercial motor vehicle pending proper registra-
tion and payment of the proper fees would not give rise to a suc-
cessful charge of unduly burdening interstate commerce.

OPINION NO. 315

November 25, 1974

Colonel Samuel S. Smith
Superintendent
Missouri State Highway Patrol
1510 East Elm
Jefferson City, Missouri 65101



Dear Colonel Smith:

This is in response to your request for an official opinion from this office involving the Missouri State Highway Patrol's authority to arrest drivers of commercial motor vehicles for operating improperly registered vehicles.

We have been provided with the following background information: Officers of the Missouri State Highway Patrol frequently arrest drivers of commercial motor vehicles for the misdemeanor of operating improperly registered vehicles. Some of these violations involve intrastate hauls without full-fee Missouri license plates; others concern out-of-state vehicles, based in states party to one of the several prorate compacts to which Missouri currently belongs, that are without proper prorata registration as a part of a fleet or without valid trip permits issued under the provisions of Section 301.265, RSMo 1969. Subsequent to conviction or the posting of bond, these drivers continue upon their

Colonel Samuel S. Smith

way without further arrests and frequently without making any effort to properly register their commercial motor vehicle in this state.

The Missouri Highway Reciprocity Commission has adopted a proposal for stricter enforcement of truck licensing laws. As part of this proposal, the Commission has instructed the Missouri State Highway Patrol to rearrest such drivers for further movement on the highways of the improperly registered vehicle until such time as full-fee Missouri registration is applied for and all fees are paid.

You have indicated that implementation of this proposal would create possible enforcement problems for the Missouri State Highway Patrol and have asked for our opinion as to the following questions:

"1. Can an officer of the Missouri State Highway Patrol legally seize a commercial motor vehicle because of improper registration and hold it until such time as proper Missouri registration is applied for and all fees are paid?

"2. Would the threat of additional arrests for further movement on the highway of an improperly registered commercial motor vehicle, until such time as proper Missouri registration is applied for and all fees paid, in effect amount to seizure and holding of the vehicle?

"3. Could an officer of the Missouri State Highway Patrol incur civil liability for damages by detention of a vehicle under either of the circumstances outlined in Questions 1 and 2 - specifically in regard to loss of revenue or failure to provide protection for the vehicle and cargo?

"4. Could lengthy delays of interstate shipments, occasioned by one of the enforcement methods outlined in Questions 1 and 2, place an officer of the Missouri State Highway Patrol in jeopardy for impeding interstate commerce?"

Colonel Samuel S. Smith

In view of the background material quoted above, it will not be necessary to address ourselves to the first question. It seems clear that the Highway Patrol has not been instructed by the Missouri Highway Reciprocity Commission to seize and hold improperly registered commercial motor vehicles until such time as proper Missouri registration is applied for and all fees are paid.

In response to your second inquiry, the real question is not whether additional arrests for further highway movement of an improperly registered commercial motor vehicle amounts to seizure and holding of the vehicle, but rather whether a statement that such arrests will be made is legal and proper. Section 43.160, RSMo 1969, provides in pertinent part that:

"It shall be the duty of the patrol to police the highways constructed and maintained by the commission; to regulate the movement of traffic thereon; to enforce thereon the laws of this state relating to the operation and use of vehicles on the highways; . . . It shall be the duty of the patrol to cooperate with such state official as may be designated by law in the collection of all state revenue derived from highway users as an incident to their use or right to use the highways of the state, including all license fees and taxes upon motor vehicles, trailers, and motor vehicle fuels, . . ."

In conjunction with this duty, any member of the Missouri State Highway Patrol may arrest any person he sees violating or whom he has reasonable grounds to believe has violated any law of this state relating to the operation of motor vehicles. Section 43.195, RSMo 1969. Section 301.320, RSMo 1969, prohibits the operation of a motor vehicle or trailer in this state on which there is displayed on the front or rear thereof any other plate, tag, or placard bearing any number except the plate furnished by the Director of Revenue or the placard authorized in the licensing statutes. Subsection 3 of Section 301.265, RSMo Supp. 1973, in pertinent part, provides as follows:

". . . If any vehicle which is not registered in such manner as to legally authorize its operation on Missouri highways comes into this state without a valid trip permit, the owner or operator . . . must

Colonel Samuel S. Smith

register such vehicle and pay the registration fees prescribed by sections 301.055 to 301.067 for the balance of the registration year before the operation of such vehicle shall be lawful."

Accordingly, the operation of an improperly registered commercial motor vehicle is unlawful in this state. The arrest of a driver of such a vehicle by a member of the Highway Patrol would be within the scope of his official duties. This reasoning would apply for the tenth arrest as well as the first arrest. This being so, a statement to the driver that further arrests will be made should he choose to move an improperly registered commercial motor vehicle upon the highways of this state without securing proper registration would not be illegal or improper. Appellate court decisions in this state have consistently held that an officer attempting to exercise a police power granted by the state would not be wrong in any respect by stating that a guilty party, or one who would become guilty if he did the act in question, will be arrested. See Butler v. City of Moberly, 110 S.W. 682, 683 (K.C.Mo.App. 1908) and Kramer v. City of Jefferson, 124 S.W.2d 525, 527 (K.C.Mo.App. 1939).

Your third question deals with the issue of civil liability of an officer of the Missouri State Highway Patrol should damages arise through loss of revenue or failure to provide protection for the vehicle and cargo during that period of time the vehicle is parked pending proper registration. The answer to this question depends upon the actions of the officer. If the commercial motor vehicle is improperly registered, or the officer has reasonable grounds to believe that such vehicle is improperly registered, an arrest of the driver or the statement that a driver will be arrested would be within the scope of his official duties. As a general rule, public officers, when acting in good faith within the scope of their authority, are not liable in private actions. See 67 C.J.S. Officers §125, p. 417.

This general rule does not apply to any injuries caused by a negligent performance of official duties by a public officer. However, the Missouri Supreme Court in State ex rel. City of St. Louis v. Priest, 152 S.W.2d 109, 112 (Mo. 1941), has said that negligence on the part of an officer consists only in a failure to use that degree of care which an ordinary, reasonable and prudent man would exercise under the same or similar circumstances and conditions. If an injured party has himself contributed to the damages complained of in any degree by his own fault or neglect, a public officer cannot be held responsible. Applying these

Colonel Samuel S. Smith

principles, it seems clear that the driver or owner of a commercial motor vehicle is in no position to claim damages against a member of the Missouri State Highway Patrol because he has heeded the warning of that member and not driven his motor vehicle upon the highways in this state until such time as the proper registration and licensing has been applied for and all fees paid.

Your last question asks whether an officer of the Missouri State Highway Patrol would be placed in jeopardy for impeding interstate commerce should lengthy delays in interstate shipments occur during the period in which the driver or owner of the improperly registered commercial motor vehicle is securing the proper registration and paying the proper fees to the state of Missouri. The answer to this question depends upon whether or not a state can lawfully exact a registration fee from commercial motor vehicles bearing interstate cargo. The fees for licensing and registration in this state are of course revenue measures and are collected from individuals for the privilege of using the highways of the state. See State ex rel. McClung v. Becker, 233 S.W. 54, 55 (Mo. Banc 1921), and Transport Rentals, Inc. v. Carpenter, 325 S.W.2d 745, 747 (Mo. 1959). The question of whether or not the collection of such fees constitutes an undue burden upon interstate commerce has been answered in the negative by the United States Supreme Court. Absent federal legislation upon this subject, states may, within the limits of reasonableness, regulate the use of their highways by common carriers engaged in interstate commerce, provided such use is not prohibited altogether and provided there is no discrimination against commerce. See Hendrick v. Maryland, 235 U.S. 610 (1915); Kane v. New Jersey, 242 U.S. 160 (1916); and Capitol Greyhound Lines v. Brice, 339 U.S. 542, 17 A.L.R.2d 407 (1950).

This being so, it is difficult to imagine a successful charge of unduly burdening interstate commerce being directed at an officer of the Missouri State Highway Patrol by an individual who has been told that he will be arrested for operating a commercial motor vehicle in this state when such vehicle is not properly licensed under the laws of this state.

CONCLUSION

It is, therefore, the opinion of this office that:

1. A statement that additional arrests will be made if there is further movement on the highway of an improperly registered commercial motor vehicle, or that further arrests subsequent to the first arrest for movement on the highway of an improperly registered commercial motor vehicle will be made by

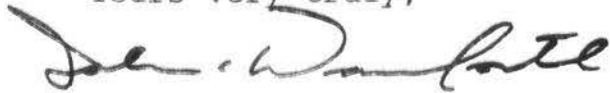
Colonel Samuel S. Smith

members of the Missouri State Highway Patrol, as proposed by the Missouri Highway Reciprocity Commission, is not illegal or improper under Missouri law.

2. Such action by an officer of the Missouri State Highway Patrol would not render him liable to civil damages for loss of revenue or damage to the vehicle and cargo during the period of time that the vehicle is parked pending proper registration and payment of proper fees.

3. Any delay in movement of the goods contained in the improperly registered commercial motor vehicle pending proper registration and payment of the proper fees would not give rise to a successful charge of unduly burdening interstate commerce.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

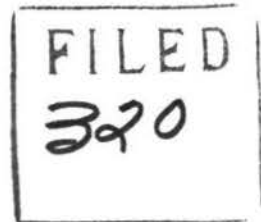
CONSTITUTIONAL LAW:
STATE BUILDINGS:

The Wainwright Building architectural design contest does not violate Section 38(a) of Article III of the Missouri Constitution because the payment of prize money to the architects who submitted the winning designs for renovation and reconstruction of the Wainwright Building constituted a payment for services of the architects and not a gratuitous grant prohibited by the provisions of Section 38(a) of Article III.

OPINION NO. 320

October 31, 1974

Honorable Hayden Morgan
State Representative, District 135
Rural Route 2
Nevada, Missouri 64772



Dear Representative Morgan:

This is in response to your request for an official opinion on the following question:

"Whether the award of prize money for the architectural design contest for the Wainwright Building is constitutional under Article III, Section 38A which provided; 'The General Assembly shall have no power to grant public money . . . to any private person, association, or corporation', except in certain specified cases."

The factual context out of which this question arises may be briefly summarized as follows: The state desires to renovate the Wainwright Building and to construct additional office space on the same city block. Because of the historic and architectural significance of the Wainwright Building, a contest was devised in order to secure the most appropriate design for the renovation and construction. Specifications for submissions were drawn up and a jury was chosen. The contest was established in two stages with only five finalists participating in the second stage of competition. The first prize winner is to be awarded the contract for architectural services at 7% of construction costs. Should the project not continue past competition, the first prize winner would receive a lump sum award of \$30,000.00.

Honorable Hayden Morgan

The second prize winner would receive \$12,500.00, the third prize winner \$7,500.00, and the two honorable mentions \$5,000.00.

The full text of Article III, Section 38(a) of the Missouri Constitution, is as follows:

"The general assembly shall have no power to grant public money or property, or lend or authorize the lending of public credit, to any private person, association or corporation, excepting aid in public calamity, and general laws providing for pensions for the blind, for old age assistance, for aid to dependent or crippled children or the blind, for direct relief, for adjusted compensation, bonus or rehabilitation for discharged members of the armed services of the United States who were bona fide residents of this state during their service, and for the rehabilitation of other persons. Money or property may also be received from the United States and be redistributed together with public money of this state for any public purpose designated by the United States."

A grant in ordinary usage can mean "to give or bestow, with or without compensation." Webster's New International Dictionary, Second Edition. We believe, however, that "grant" as used in Article III, Section 38(a) can only mean a transfer without compensation. There would be no reason to prohibit transfer of state money or property if the state received consideration therefor. This interpretation is buttressed by the exceptions contained in the section as all these exceptions are clearly gratuitous grants.

With this definition in mind, it is necessary to examine the legal nature of the contest to determine whether it involves such a gratuitous transfer. Contests of this nature are generally held to be contracts or, at the very least, are dealt with in contractual terms.

"Prizes are frequently offered in order to induce entries in competitive trials of strength, skill, knowledge, or other capacity. The making of an entry by a competitor is the acceptance of such an offer; and the bargain thereby made is a valid contract, and not a wager, if the offeror is not himself one of the competitors for the prize.

Honorable Hayden Morgan

Such a bargain contemplates the exchange of the amount of the prize and other requisite performances by the offeror, in return for the collective performances of all the competitors. It is true that the losing competitors will get nothing in exchange for their efforts; and if the transaction between the offeror and each entrant were regarded as a wholly separate one, it would be included within the definition of a wager. But it is not a wholly separate transaction: The prize is promised in order to induce the giving of a desired equivalent, this equivalent being the efforts of all the competitors together. Each competitor does, indeed, take the chance of getting nothing for his effort. But the offeror takes no such chance; whoever may be the winner, he gets exactly the same performance by the competitors in exchange for his money."

6A Corbin on Contracts §1489, p. 656, (1962).

The case of Tilley v. City of Chicago and Cook County, 103 U.S. 155, 26 L.Ed. 374 (1881), involved a contest for the design of a building to be erected by the City of Chicago and Cook County. The court dealt with the issue in terms of contract law.

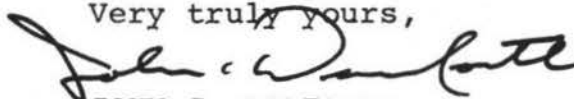
"By the payment to the plaintiff in error of the prize, the defendants discharged every obligation due from them to him arising out of the preparation of plans for the proposed building. . . ." Id. at 160.

CONCLUSION

It is the opinion of this office that the Wainwright Building architectural design contest does not violate Section 38(a) of Article III of the Missouri Constitution because the payment of prize money to the architects who submitted the winning designs for renovation and reconstruction of the Wainwright Building constituted a payment for services of the architects and not a gratuitous grant prohibited by the provisions of Section 38(a) of Article III.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Robert Presson.

Very truly yours,



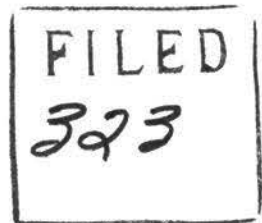
JOHN C. DANFORTH
Attorney General

October 29, 1974

OPINION LETTER NO. 323

Answer by Letter - Bartlett

Dr. Arthur L. Mallory
Commissioner
Missouri State Department of Elementary
and Secondary Education
Jefferson State Office Building
Jefferson City, Missouri 65101



Dear Commissioner Mallory:

In accordance with your request of September 16, 1974, we have reviewed the Missouri State Department of Elementary and Secondary Education's "Application for Program Grant for Migratory Children (fiscal year 1975)." This application is being submitted under Title I of the Elementary and Secondary Education Act of 1965, P.L. 89-10, as amended by P.L. 89-750, P.L. 90-247, P.L. 91-230, and P.L. 92-318 (Section 20 U.S.C. Section 241 e(c)(1)).

In addition to the Elementary and Secondary Education Act of 1965 as amended, and the regulations propounded pursuant thereto (45 C.F.R. 116, April 1, 1974 edition), our review has taken into consideration Article III, Section 38(a), Missouri Constitution, and Section 161.092, RSMo 1973 Supp., and Section 178.430, RSMo 1969.

Based on the foregoing, we hereby certify that the Missouri State Department of Elementary and Secondary Education has authority under state law to perform the duties and functions of a "state educational agency" as defined in Title I of Public Law 89-10 (20 U.S.C. Section 244), including those arising from the assurances set forth in the application, and that the State Department of Elementary and Secondary Education has the authority to submit and administer the special educational programs and projects for migratory children as set forth in the application.

Dr. Arthur L. Mallory

This opinion letter constitutes our official certification and should be inserted in the appropriate place in each copy of the application.

Very truly yours,

JOHN C. DANFORTH
Attorney General

STATE AUDITOR:
PETITIONS:
VOTERS:
REGISTRATION:

With respect to petitions for the audits of political subdivisions by the state auditor under subsection 2 of Section 29.230, RSMo, that: (a) "qualified voter" as used in such subsection means registered voter; (b) petitioners must be registered as of the time of signing the petitions although the auditor may use the notarization date as the date to verify whether such signers are registered in the absence of any date on the petitions indicating the precise date of the signatures; (c) insufficient petitions may be supplemented by permission of the state auditor if the auditor believes that there is a reasonable expectation that sufficient signatures may be obtained within a reasonable time.

OPINION NO. 324

October 16, 1974

Honorable John D. Ashcroft
State Auditor of Missouri
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Ashcroft:

This opinion is in response to your questions asking:

"Must a signer of a petition for an audit of a political subdivision by the State Auditor under subsection 29.230(2) RSMo 1969 be registered to vote in order to be a 'qualified voter' within the meaning of the subsection?"

"If the answer to the above is yes, when must the signatory be registered?"

- a. Must the petitioner be registered by the date of the last gubernatorial election?
- b. Must the petitioner be registered at the time of his signing the petition?
- c. May the signer qualify if he registers after signing the petition and before delivery to the State Auditor?

Honorable John D. Ashcroft

d. May the signer qualify if he registers after signing the petition and before final determination of the validity of the petition by the State Auditor?

"May valid signatures be added to a special audit petition after delivery to the State Auditor. . ."

Section 29.230, RSMo, provides:

"1. In every county which does not elect a county auditor, the state auditor shall audit, without cost to the county, at least once during the term of which any county officer is chosen, the accounts of the various county officers supported in whole or in part by public moneys. The audit shall be made as near the expiration of the term of office as the auditing force of the state auditor will permit.

"2. The state auditor shall audit any political subdivision of the state, including counties having a county auditor, if requested to do so by a petition signed by five percent of the qualified voters of the political subdivision determined on the basis of the votes cast for the office of governor in the last election held prior to the filing of the petition. The political subdivision shall pay the actual cost of audit. No political subdivision shall be audited by petition more than once in any one calendar or fiscal year."

With respect to your first question asking whether "qualified voter" within the meaning of subsection 2 of Section 29.230 means "registered voter", it is our view that the words "qualified voter" do mean "registered voter". We reach this conclusion because of the holding of the Missouri Supreme Court in State ex rel. Socialist Workers' Party of Missouri v. Kirkpatrick, No. 58,784 (Mo. Banc September 11, 1974). In that case the court held that signatures on nominating petitions under subsection 3 of Section 120.160, RSMo, which refers to "qualified voters" must be signatures of "registered voters". In reaching this conclusion, the court stated at l.c. 4:

Honorable John D. Ashcroft

" . . . it is our view that the better reasoned cases are those that rule that a 'qualified voter' is one that, in addition to other qualifications, must be registered where such is required as a condition for voting."

In answer to your second question, it is our view that the petition signer must be registered at the time of signing the petition.

In the holding of the Missouri Supreme Court in Scott v. Kirkpatrick, No. 58,584, (Mo. Banc July 22, 1974), it was implicitly assumed, at l.c. 5, that under Section 126.151, RSMo Supp. 1973, a person signing an initiative petition proposing a measure must be a qualified voter at the time the petition is presented to him. While the Scott case may seem distinguishable because the section then under consideration required that the petition signer be "legally entitled to vote" on the measure and made it a crime for a person to sign who "is not at the time of signing the same a qualified voter of this state," we believe that the court would reach the same conclusion in the present case. Further, in the Socialist Workers' Defilipis v. Russell, 328 P.2d 904 (1958) in which the Supreme Court of the State of Washington held that a person filing for the office of state representative had to be a "registered voter" at the time of filing for the office and that it was not sufficient if he registered eight days after filing for such office.

There is no requirement that the date any person signed the petition must appear on the petition. In most instances, therefore, the only date appearing on the petitions will be the date of notarization. This date therefore may be used as the date for the verification of whether the signers are registered in the absence of any date on the petition indicating the precise date of the signatures.

In answer to your last question asking whether additional signatures may be added after the petitions are filed, it is our view that such additional signatures may be added.

This result is consistent with the holding of the Missouri Supreme Court in State ex rel. Voss v. Davis, 418 S.W.2d 163 (1967) in which the court held with respect to petitions filed pursuant to Sections 19 and 20 of Article VI of the Missouri Constitution to amend the city charter of Kansas City that the right of initiative is to be liberally construed. The court in Voss concluded that it would be unduly restrictive of a constitutional right to refuse those interested a reasonable opportunity to

Honorable John D. Ashcroft

secure additional signatures if the Kansas City Election Board were to close the mark on the first attempt. While the court in that case was construing the provisions of Sections 19 and 20 of Article VI of the Missouri Constitution relating to "petitions" it is our view that the Voss opinion would be followed in determining whether original petitions provided for in subsection 2 of Section 29.230 can be supplemented. Notably, in Voss, the court permitted the election board to supplement the original petitions within a ten day period and in doing so observed that it was "not a case where the number of signatures first obtained was so small as to make preposterous the expectation of obtaining sufficient additional signatures, or where the extension or period of time within which additional petitions were permitted was so long as to make stale the signatures on the petitions first filed."

We therefore conclude that the auditor may permit supplementary petitions to be filed within a reasonable period of time when there is some possibility that the required signatures can be obtained.

CONCLUSION

It is the opinion of this office with respect to petitions for the audits of political subdivisions by the state auditor under subsection 2 of Section 29.230, RSMo, that: (a) "qualified voter" as used in such subsection means registered voter; (b) petitioners must be registered as of the time of signing the petitions although the auditor may use the notarization date as the date to verify whether such signers are registered in the absence of any date on the petitions indicating the precise date of the signatures; (c) insufficient petitions may be supplemented by permission of the state auditor if the auditor believes that there is a reasonable expectation that sufficient signatures may be obtained within a reasonable time.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,



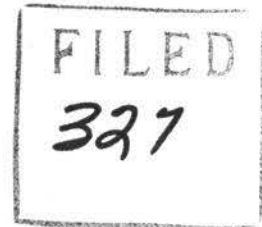
JOHN C. DANFORTH
Attorney General

COMPENSATION: To the extent that the salaries of as-
COUNTY OFFICERS: sessors of second, third, or fourth
COUNTY ASSESSORS: class counties would be increased by
the provisions of Section 53.071.3,
Senate Bill No. 373, 77th General Assembly, Second Regular Ses-
sion, because of the use of the present tax year's assessed val-
uation instead of the preceding year's assessed valuation, such
section does not apply to such assessors during their present
terms of office.

OPINION NO. 327

December 18, 1974

Honorable James Eiffert
Prosecuting Attorney
Christian County
P. O. Box 395
Ozark, Missouri 65721



Dear Mr. Eiffert:

This is in response to the following question posed by you:

"When the assessed valuation of a County increases from one salary level to another as defined in Section 53.071, R.S.Mo., Supplement, 1974, Act 78, Senate Bill No. 373, when does the increased salary for the County Assessor become effective?"

The statute you refer to is Senate Bill No. 373, Second Regular Session, 77th General Assembly. Section 53.071.3 of that act provides:

"For the purpose of computing an assessor's compensation, the term 'assessed valuation' means the total assessed valuation of his county as computed by the state tax commission for the tax year in which the September first, which begins the year of incumbancy [sic] for which the annual compensation is computed falls. The state tax commission shall provide the department of revenue with each such computation of valuation made by them."

Honorable James Eiffert

Section 53.071.1, Senate Bill No. 373, provides for the level of compensation of county assessors to be based on the assessed valuation of the particular county.

We understand your opinion request to deal with the following problem. The term of office of a county assessor begins on September 1 next following his or her election, Section 53.010, RSMo 1969. The level of the assessor's compensation is based on the assessed valuation of the county, Section 53.071.1. Where the assessed valuation of a county increases from one level set out in Section 53.071.1 to a higher level, the assessor is entitled to increased compensation. Your opinion request asks when the assessor, under these circumstances, becomes entitled to the increased compensation.

The basic rule of statutory construction is to seek the intent of the lawmakers and, if possible, to effectuate that intention. The person construing the statute should ascertain the legislative intent from the words used if possible and should ascribe to the language used its plain and rational meaning. State ex rel. Clay Equipment Corporation v. Jensen, 363 S.W.2d 666 (Mo.Banc 1963).

We note that Section 53.071.1 provides that ". . . each county assessor, except in counties of the first class, shall receive an annual salary for his services . . ." (emphasis added). In State ex rel. Harvey v. Linville, 300 S.W. 1066 (Mo. 1927), the court interpreted the words "annual salary," as used in a statute setting the compensation for superintendents of schools, to mean the salary for each year of the incumbency. This office concluded in Opinion No. 85, Stewart, 1961, attached hereto for your reference, that "annual" salary is the salary for each year of an officer's incumbency. Therefore, as Section 53.071.1 provides for an annual salary and as Section 53.071.3, quoted above, uses the clause ". . . the year of incumbency [sic] for which the annual compensation is computed . . .," the compensation for assessors of second, third, and fourth class counties is clearly to be determined on an annual (twelve-month) basis, rather than for the whole four-year term of office.

Section 53.010, RSMo 1969, provides that the county assessors are to take their office on September 1 next following their election. We also note that Section 53.071.3 refers to the fact that a year of incumbency for an assessor begins on September 1. In State ex rel. Harvey v. Linville, supra at 1067, the court said:

". . . we conclude further that 'annual,' as applied to salaries, means not the calendar years, but the years of the incumbent's term,

Honorable James Eiffert

which in the case of relator begins on the 1st day of April each year."

Therefore, we conclude that the annual level of compensation of an assessor is to be paid for the period of September 1 to August 31 of the following year.

Section 53.071.3, quoted above, clearly provides that "assessed valuation," which is the basis for determination of the annual level of compensation of assessors, means total assessed valuation of the county as computed by the State Tax Commission. This section also provides that such total assessed valuation is to be computed

". . . for the tax year in which the September first, which begins the year of incumbency [sic] for which the annual compensation is computed falls. . . ."

We interpret Section 53.071.3 to mean that an assessor's salary for any particular twelve-month period (beginning September 1) is to be based on his county's total assessed valuation for the tax year which encompasses the first day of September beginning the new year of incumbency. For example, the level of compensation for the year of incumbency beginning September 1, 1974, and ending August 31, 1975, is to be determined from the total assessed valuation for tax year 1974. Such is the plain and rational meaning of the words used in Section 53.071.3.

Section 137.080, RSMo 1969, provides:

"Real estate and tangible personal property shall be assessed annually at the assessment which commences on the first day of January."

Therefore, a tax year is on a calendar year basis. As Section 53.071.3 provides for the annual compensation of the assessor to be determined on the basis of the county's assessed valuation for the tax year in which the beginning of the assessor's twelve-month pay period falls (i.e., September 1), we hold that Section 53.071.3 entitles an assessor to an increased level of compensation beginning on September 1 of any year in which the total assessed valuation for the county for that calendar (tax) year, assessed as of January 1, reaches a higher plateau as set out in Section 53.071.1.

We recognize that a particular county might have some difficulty in determining, by September 1, whether the assessed valuation for that year has increased so as to reach a new plateau set

Honorable James Eiffert

out in Section 53.071.1. The difficulty arises because the State Tax Commission may not, in a particular year, certify an increase in the assessed valuation of a county until after September 1. However, this fact would in no way affect the obligation of the county and state to pay the level of salary to which the assessor is entitled under the statutes. This is because the assessed valuation is as of January 1, even though assessment may not be completed until a later date. Long v. City of Independence, 229 S.W.2d 686 (Mo. 1950).

The rule is that the statutes create the right of a public official to compensation for his services and such official is entitled to receive or recover the compensation to which he is entitled. Bates v. City of St. Louis, 54 S.W. 439 (Mo. 1899); Davenport v. Teeters, 315 S.W.2d 641 (Spr.Ct.App. 1958). The failure of the county court to budget the full amount of salary due an official does not bar the right of such official to be paid the balance of the salary due him. Gill v. Buchanan County, 142 S.W.2d 665 (Mo. 1940). With these rules in mind, it is the opinion of this office that where the assessed valuation of a county increases so as to entitle a county assessor to increased compensation, such assessor is entitled to the increased compensation from September 1 of that taxable year despite the possibility that the increase in the assessed valuation may not be finally known to the county until after September 1. We believe that the language of Section 53.071.3 clearly intends such a result.

In your opinion request you also make reference to Article VII, §13, Missouri Constitution. This section provides:

"The compensation of state, county and municipal officers shall not be increased during the term of office; . . ."

The question is whether an increase in the annual compensation of a county assessor during his term of office, as provided in Section 53.071.1, by reason of an increase in the assessed valuation of the county violates this constitutional provision.

The Missouri Supreme Court has previously held that the constitutional prohibition against increasing the compensation of a public officer during his term of office is not violated where the increase is due to a change in some classification provided by a statute in effect when the official took office. In State ex rel. Harvey v. Linville, *supra*, the court had before it a statute which set the county school superintendent's annual salary at a level to be determined by the county population as determined by the vote at the last general election. The court held that this salary increase, due to an increase in population,

Honorable James Eiffert

did not violate the constitutional prohibition. The court reasoned that:

"The increase of salary which a statute permits after an election showing an increase of population is not in violation of the Constitution, in that the salary is increased during the term for which the officer was elected, because the law in force at the time of his election fixes his salary, to be ascertained at periods as changed by the increase in population. [Citation omitted] The salary of an officer, dependent upon the population as ascertained from time to time, would be determined by the law in force at the time of his election, . . ."
Id. at 1067.

See also, to the same effect, State ex rel. Moss v. Hamilton, 260 S.W. 466 (Mo.Banc 1924), cited in the Linville opinion.

While we have found no cases dealing with the applicability of the constitutional prohibition to a statute setting salary levels based on assessed valuation, we believe that the holdings of State ex rel. Harvey v. Linville and State ex rel. Moss v. Hamilton, supra, control the instant question. That is, an increase in the annual salary of a county assessor of a second, third, or fourth class county pursuant to Section 53.071.1, which occurs solely by reason of an increase in the assessed valuation of the county, does not violate the prohibition of Article VII, §13, Missouri Constitution, as to an assessor whose term of office begins after the effective date of the statute.

We note, however, that county assessors are elected at the general election for a four-year term and that the last such election was in November, 1972. Section 53.010, RSMo 1969. Therefore, the present county assessors in second, third, and fourth class counties began their terms of office on September 1, 1973. Section 53.010. As Senate Bill No. 373, 77th General Assembly, took effect August 13, 1974, the question arises whether Article VII, §13 would prohibit an incumbent county assessor from realizing an increase in his annual salary under Section 53.071.1, due to an increase in the assessed valuation of the county. Section 53.071.1, Senate Bill No. 373, provides the same levels of compensation for assessors of second, third, and fourth class counties as did its predecessor statute, Section 53.071.1, RSMo Supp. 1973, effective September 1, 1970. Therefore, the level of compensation provided in present Section 53.071.1 does not amount to an increase in compensation for assessors and does not violate Article VII, §13.

Honorable James Eiffert

However, we also note that Section 53.071.3, Senate Bill No. 373, provides for a change in the method of figuring the assessed valuation of a county for purposes of Section 53.071.1, from the method provided in the former statute. Assessed valuation for purposes of the present statute is the total assessed valuation for the tax year in which the September 1 beginning a particular year of incumbency falls, while the former statute provided that assessed valuation was the total assessed valuation "for the tax year immediately preceding the tax year for which the salary is paid." Section 53.071.3, RSMo Supp. 1973.

Thus, the question becomes whether a change in the method of determining the level of compensation, enacted during the term of the incumbent officeholders, amounts to an increase in compensation prohibited by Article VII, §13. Certainly, the change in the method of determining compensation found in Section 53.071.3, Senate Bill No. 373, does not automatically work to increase the compensation of assessors. But it may do so by the fact that an increase in assessed valuation for a particular county, so as to raise the level of compensation, will increase the salary of the assessor one year sooner than under the previous section.

The basic rule in interpreting statutes in light of constitutional provisions such as Article VII, §13 was stated by the Wyoming Supreme Court thus:

" . . . 'Constitutional or statutory provisions prohibiting a change in the compensation of public officers after their election or appointment or during their terms of office are given effect in accordance with their intent, and may not be circumvented by indirect changes.'" Blackburn v. Board of County Commissioners of Park County, 226 P.2d 784, 788 (Wyo. 1951).

Moreover, it is said in interpreting statutes such as Section 53.071.3:

" . . . There is no distinction between a law enacted during an officer's term which, by its express terms, proposes to increase or diminish his compensation during such term and one which furnishes a standard by which such result may be obtained. They equally violate the constitutional provision . . ."
63 Am.Jur.2d Public Officers and Employees
§373 p. 855 (1972).

Honorable James Eiffert

In State ex rel. Gilbert v. Board of Com'rs of Sierra County, 222 P. 654 (N.M. 1924), the court had before it a statutory change similar to that found in Section 53.071.3. The old statute provided for determining the salaries of county officers based on assessed valuation, the statute directing that assessed valuation was to be redetermined every four years. The new statute provided for the same levels of compensation, but directed that assessed valuation be redetermined every two years. The New Mexico court held that the statutory change, as applied to incumbents, violated New Mexico's constitutional prohibition against increasing or decreasing the compensation of public officers during their terms.

In State ex rel. Harvey v. Linville, supra, the court considered a statute which changed the method of determining the salaries of superintendents of schools. The level of compensation was determined on the basis of county population, the old statute figuring population on the vote at the last general election, and the new statute using the vote at the last presidential election. The Missouri Supreme Court held that the statutory change was inapplicable to the incumbent officeholders by virtue of the predecessor to Article VII, §13. While the statute involved in the Linville case also provided for increased levels of compensation, the court apparently concluded that both the method of calculating population and the increased compensation schedule violated the constitutional provision as to incumbents.

The reasoning behind the Linville and Sierra County cases was followed by this office in Opinion No. 399, Brandom, 1969, attached hereto for your reference. That opinion dealt with a statute which changed the methods of compensating certain officers. We concluded that if the statute did in fact provide an increase in compensation for any particular officers, the statute would not become effective to the extent that compensation would be increased until the end of the present term of such officers. Our conclusion with respect to Section 53.071.3, Senate Bill No. 373, is the same. That is, to the extent that Section 53.071.3 would work to increase the salary of an assessor during his present term by reason of using the present tax year assessed valuation instead of the preceding tax year assessed valuation, such section will not become effective as to that assessor until the end of his present term. This result is required by the conclusion, supported by the Linville and Sierra County cases, that any increase in compensation of a public officer during his term of office, whether by expressed provision or indirect affect of the statute violates Article VII, §13, Missouri Constitution.

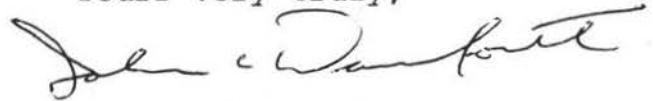
Honorable James Eiffert

CONCLUSION

We conclude that to the extent that the salaries of assessors of second, third, or fourth class counties would be increased by the provisions of Section 53.071.3, Senate Bill No. 373, 77th General Assembly, Second Regular Session, because of the use of the present tax year's assessed valuation instead of the preceding year's assessed valuation, such section does not apply to such assessors during their present terms of office.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Dan Summers.

Yours very truly,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 85
1-26-61, Stewart

Op. No. 399
10-9-69, Brandom

REGIONAL PLANNING COMMISSION:
PLANNING AND ZONING:

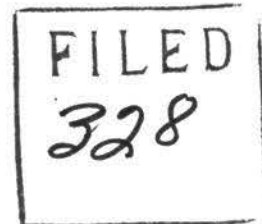
The requirements of notice,
publication and public hear-
ing contained in Section

251.430, RSMo, do not apply to the withdrawal at the end of a
fiscal year of a regional planning commission by a local unit
of such regional planning commission when the commission has
been in existence more than ninety days.

OPINION NO. 328

October 29, 1974

Honorable Dan K. Purdy
Prosecuting Attorney
St. Clair County
Post Office Box 332
Osceola, Missouri 64776



Dear Mr. Purdy:

This opinion is in response to your question asking what
method a local unit must follow to withdraw from a regional
planning commission which has been created under the provisions
of Sections 251.150, RSMo et seq.

The section to which you particularly refer, Section 251.430,
RSMo, provides:

"Within ninety days of the issuance by the
governor of an order creating a regional
planning commission, any local unit of gov-
ernment within the boundaries of such region
may withdraw from the jurisdiction of such
commission by a two-thirds vote of the mem-
bers of the governing body after a public
hearing of which notice shall have been given
not more than three nor less than two weeks
prior thereto by registered mail to the com-
mission and to the public by publication in
a newspaper of general circulation within
the boundaries of such local unit of govern-
ment. A local unit may withdraw from a re-
gional planning commission at the end of any
fiscal year by a two-thirds vote of the mem-
bers of the governing body."

Honorable Dan K. Purdy

You also indicate that the situation does not involve withdrawal within ninety days of the issuance by the governor of an order creating the commission and that the question is whether the public hearing, publication and notice provisions contained in the first sentence of the section apply to withdrawal by a local unit at the end of a fiscal year.

We note that Section 30 of Senate Bill No. 14, 73rd General Assembly, Second Extraordinary Session, originally provided:

"Within ninety days of the issuance by the governor of an order creating a regional planning commission, any local unit of government within the boundaries of such region may withdraw from the jurisdiction of such commission by a two-thirds vote of the members of the governing body after a public hearing of which notice shall have been given not more than three nor less than two weeks prior thereto by registered mail to the commission and to the public by publication in a newspaper of general circulation within the boundaries of such local unit of government. A local unit may withdraw from a regional planning commission at the end of any fiscal year by a two-thirds vote of the members of the governing body taken at least six months prior to the effective date of such withdrawal. However, such unit shall be responsible for its allocated share of the contractual obligations of the regional planning commission continuing beyond the effective date of its withdrawal. (Emphasis added).

It therefore appears from the above underscored matter which was deleted before final passage that the bill as originally drafted would have required the vote at least six months prior to the effective date of withdrawal and that such a notice would have been sufficient to apprise all concerned in ample time of the withdrawal of the unit. When the legislature deleted this provision it did not undertake to provide any other requirements with respect to public hearing, notice and publication, and, in view of the plain language of the statute we do not believe that we have the authority to supply such requirements.

There is admittedly some question as to why the legislature did not expressly require some public hearing, notice or publication as it did with respect to the ninety day provision. Although

Honorable Dan K. Purdy

such a deficiency may appear to be logically questionable, it does not create an absurd situation or competely unworkable results and therefore we conclude that the language in question must be read to allow the withdrawal of a local unit at the end of any fiscal year by a two-thirds vote of the members of the governing body and that the public hearing, notice and publication requirements contained in the first sentence of such section are not applicable to such withdrawals.

The further question arises as to whether the fiscal year referred to in the statute is the fiscal year of the local unit or of the regional planning commission. We note that Section 251.400, RSMo, refers to the fiscal year of the regional planning commission and provides, in part, as follows:

" . . . The budget as prepared by the regional planning commission shall show the proportionate share of each local governmental unit participating in such commission and shall be submitted to each participating local governmental unit at least sixty days prior to the end of the regional planning commission's fiscal year. . . ."

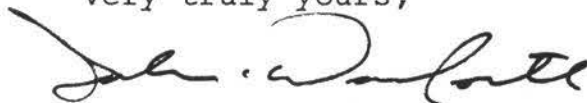
Further, since the context of Section 251.430 appears to focus on the creation and functioning of the regional planning commission we conclude that "fiscal year" as used therein with respect to withdrawal by a local unit means the fiscal year of the commission.

CONCLUSION

It is the opinion of this office that the requirements of notice, publication and public hearing contained in Section 251.430, RSMo, do not apply to the withdrawal at the end of a fiscal year of a regional planning commission by a local unit of such regional planning commission when the commission has been in existence more than ninety days.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,



JOHN C. DANFORTH
Attorney General



OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

JOHN C. DANFORTH
ATTORNEY GENERAL

October 8, 1974

OPINION LETTER NO. 330

Honorable Zane White
Prosecuting Attorney
Phelps County Courthouse
Rolla, Missouri 65401

Dear Mr. White:

This letter is issued in response to your request for a ruling on the following question:

The City of Rolla, Missouri has a city sales tax in effect. If a city merchant who takes orders by mail, telephone or traveling salesman and delivers the merchandise so ordered to the purchaser who is outside the city limits, does the City of Rolla Sales tax apply to the above sales."

The precise question which you ask was presented in the recent case of Fabick and Company v. Schaffner, 492 S.W.2d 737 (Mo. 1973). In that case the Supreme Court of Missouri held that if the place of business of a seller of property subject to the City Sales Tax Act, Sections 94.500 to 94.570, RSMo 1969, is within a city imposing a city sales tax, that tax is applicable to all sales made by the seller to purchasers within the state of Missouri.

Yours very truly,

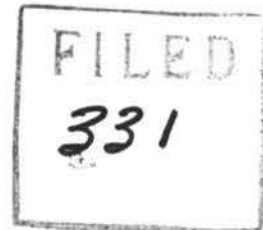
A handwritten signature in cursive script, reading "John C. Danforth".

JOHN C. DANFORTH
Attorney General

December 31, 1974

OPINION LETTER No. 331

Mr. Robert L. James, Commissioner
Office of Administration
Room 125, State Capitol
Jefferson City, Missouri 65101



Dear Mr. James:

This is in reply to your request for an opinion of this office asking several questions concerning Section 6.360 of C.C.S.H.B. 1006, 77th General Assembly. The first question is whether moneys that have been appropriated for one object purpose can be expended for another object purpose.

You state that in Section 6.360 the legislature did not appropriate \$128,000.00 from general revenue as requested by the Department of Social Services for building and grounds expenses for the Federal Soldiers' Home; whereas this amount was apparently included under the grouping travel and transportation, office supplies and equipment, communications, data processing expense, printing and publication, institutional services, other expenses, in that this grouping has an excess of \$128,000.00 over the amount requested by the Department.

Section 6.360 provides in appropriate part as follows:

"To the Department of Social Services

...

For Federal Soldiers' Home

Personal Service (FTE 27).....\$148,924

Equipment Purchase and Repair..... 1,000

Operation:

Travel and Transportation,

Office supplies and equipment,

Communications, Data Processing
 expense, Printing and publication,
 Institutional services, Other
 expenses.....\$213,126
 Professional and
 Technical Services. 400
 Total Operation.....\$213,526

From General Revenue.....\$363,450
 Personal Service (FTE 97.5).....\$606,469
 Equipment Purchase and Repair..... 18,400
 Operation:

Travel and transportation,
 Office supplies and equip-
 ment, Communications, Data
 Processing expense, Printing
 and publication, Institutional
 services,
 Other expenses.....\$112,464
 Professional and
 technical services... 1,000
 Building and grounds
 expense..... 13,585

Total Operation \$127,049
 From State Federal Soldiers'
 Home Fund.....\$751,918

Total..... \$1,653,690

The purpose of this appropriation shall not
 be altered without the prior approval
 of the Committee on State Fiscal
 Affairs and the concurrence of the
 Commissioner of Administration and
 any moneys not spent specifically
 as directed shall lapse."

Finally, you state that the Committee on State Fiscal
 Affairs takes the position that such moneys can be shifted
 from one object purpose to another object purpose in that the
 \$128,000.00 can be transferred to "building and grounds."
 You have enclosed a letter from the Director of the Committee
 on State Fiscal Affairs, addressed to the Director of the De-
 partment of Social Services reading in part as follows:

"Please be advised that the Committee on
 State Fiscal Affairs in its July 16, 1974
 meeting agreed that you should make the
 necessary shift in the Federal Soldiers'

Home, Operation Appropriation, in order that the \$128,000.00 be placed in the Building and Grounds Expense account. This shift is to be made in lieu of a request for an emergency or supplemental appropriation."

What then was the legislative intent as to the purpose for which these appropriated sums may be expended? In Section 6.360, the appropriations are broken down into the general categories of personal service, equipment purchase and repair, operations and capital improvement. As far as this office is aware, the legislature has for many years appropriated for these four general purposes. Here, the legislature has then specifically broken down the category "operations" into a number of subcategories as demonstrated by the language quoted from Section 6.360.

In doing so, the legislature has also departed from the customary practice of putting the sum appropriated in the far right-hand column, and placed amounts to the left of this column and next to the various subcategories or groups of subcategories, and then put the sum of the amounts appropriated to these subcategories in the far right-hand column designated as "Total Operation."

Your problem would be solved if these subcategories with separate sums were not restrictive but only informational. Then, the total sum for "Total Operation" could be expended in any manner for any purpose generally considered to be in "operations." Thus in Section 6.360 the total sum of \$340,575 (\$213, 526 + \$127,049), or any portion thereof, or none at all, could be spent for travel and transportation, or any of the other listed items under operations, as well as buildings and grounds, and also any other subcategories not listed, but normally considered to be "operations."

This would then be precisely the same as in the past when only a total sum was appropriated for operations, with no subcategories listed. It is obvious the legislature intended to be more restrictive, and narrow the object purpose for which moneys are to be appropriated in the general area of operations by this method of detailed, itemized appropriations. Furthermore, it is clear that only those "items of separable sums of money appropriated (see State ex rel. Cason v. Bond, 1.c. 392 for this definition of 'item')" such as \$213,126, \$400, \$112,464, \$1,000 and \$13,585 are to be spent for those specific object purposes.

There is no question of course that the legislature has the power to state the purpose for which appropriations are made. In fact there is a duty to fix a purpose for each appropriation and moneys cannot be paid out except as for the purpose fixed. See Article IV, Sections 23 and 28, Constitution of Missouri; Nacy v. LePage, 111 S.W.2d 25, 26 (Mo. 1937); see also State ex rel Cason v. Bond, supra.

It is clear therefore that these appropriated items can only be used for the specific object purposes expressed. Accordingly, looking at Section 6.360, it is obvious that the legislature has only appropriated the sum of \$13,585.00 to the Department of Social Services for the purpose of Building and Grounds Expense for the Federal Soldiers' Home. It is our opinion, that none of the sums appropriated in Section 6.360 for any of the other object purposes can be expended for buildings and grounds expense. This includes those sums which are appropriated for specific object purposes and also "other expenses". In our opinion, since buildings and grounds expense is specifically provided for, buildings and grounds expense is in Section 6.360 excluded from consideration as an "other expense". In Section 6.360 therefore, other expenses could only be those operation expenses which are not listed specifically in Section 6.360.

The next question you ask is whether the Committee on State Fiscal Affairs can shift the moneys from one object purpose to another. Of course this attempt to shift money is in effect the same as altering the purpose of appropriations. Therefore, we assume any such attempt is based on Section 1.6(2), S.B. 1, and the language in these appropriations, supposedly giving such power to the Committee on State Fiscal Affairs and the Commissioner of Administration. In Opinion No. 190, April 25, 1974, Barbero, we held such provisions unconstitutional. Therefore, there is no such power to so shift appropriations.

Very truly yours,

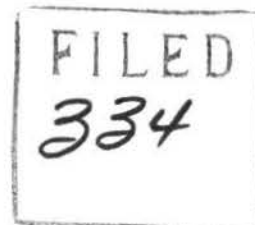
JOHN C. DANFORTH
Attorney General

SENATORS: A member of the General Assembly who is
LEGISLATORS: an agent for an insurance company is not
REPRESENTATIVES: prohibited by the Constitution or state
GENERAL ASSEMBLY: law from selling group insurance cover-
CONSTITUTIONAL LAW: ing school personnel.
CONFLICT OF INTEREST:

OPINION NO. 334

November 18, 1974

Honorable Russell Goward
Representative, District 65
2739 North Grand
St. Louis, Missouri 63106



Dear Representative Goward:

This is in response to your request for an opinion from this office as follows:

"Can a legislator doing business as an Insurance & Real Estate Broker do business with school boards, specifically: Group Insurance Contracts on school board personnel. What are the prohibitions relative to Legislators doing business with public boards and institutions supported wholly or in part with State Funds."

In substance you inquire whether a member of the General Assembly doing business as an insurance and real estate broker can sell group insurance covering school personnel.

The conflict of interest law by statute is found in Sections 105.490 and 105.495, RSMo. Section 105.450, RSMo, provides the following terms as used in these statutes have the following meanings:

"(1) 'Agency', any department, office, board, commission, bureau, institution or any other agency, except the legislative and judicial branches, of the state or any political subdivision thereof including counties, cities, towns, villages, school, road, drainage, sewer, levee and other special purpose districts;"
(Emphasis supplied)

Honorable Russell Goward

Under the above-statutory provisions of Section 105.450, Sections 105.490 and 105.495 do not apply to members of the General Assembly.

Article III, Section 12, Constitution of Missouri, provides as follows:

"No person holding any lucrative office or employment under the United States, this state or any municipality thereof shall hold the office of senator or representative. When any senator or representative accepts any office or employment under the United States, this state or any municipality thereof, his office shall thereby be vacated and he shall thereafter perform no duty and receive no salary as senator or representative. During the term for which he was elected no senator or representative shall accept any appointive office or employment under this state which is created or the emoluments of which are increased during such term. This section shall not apply to members of the organized militia, of the reserve corps and of school boards, and notaries public."

The above-constitutional provision prohibits any senator or representative from accepting any office or employment under the United States, this state or any municipality thereof, a violation of which results in the forfeiture of his office. It also prohibits him from accepting any appointive office or employment under this state which is created or emoluments increased during his term.

It is our opinion that a member of the General Assembly who, as a representative of any insurance company, sells group insurance covering school personnel is not an officer or employee of the United States, this state, or any municipality thereof and, therefore, does not come within the provisions of the above-constitutional provision.

CONCLUSION

It is the opinion of this office that a member of the General Assembly who is an agent for an insurance company is not prohibited by the Constitution or state law from selling group insurance covering school personnel.

Honorable Russell Goward

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Yours very truly,

A handwritten signature in cursive script, reading "John C. Danforth". The signature is written in dark ink and is positioned above the printed name.

JOHN C. DANFORTH
Attorney General



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

JOHN C. DANFORTH
ATTORNEY GENERAL

October 28, 1974

LETTER OPINION NO. 339

Dr. Arthur L. Mallory, Commissioner
State Board of Education
Jefferson State Office Building
Jefferson City, Missouri 65101

Dear Dr. Mallory:

Pursuant to your request of October 1, 1974, we have reviewed, for the purpose of certification, the amendments approved by the State Board of Education on September 20, 1974, to the Missouri State Plan under Title III-A of the National Defense Education Act of 1958, Public Law 85-864 (1958), as amended.

It is the opinion of this office that this amendment to the State Plan does not alter this office's previous certification of the State Plan and that the State Plan as amended can, with respect to the use of federal funds, be carried out in the State of Missouri.

Very truly yours,

A handwritten signature in cursive script, reading "John C. Danforth".

JOHN C. DANFORTH
Attorney General

SCHOOLS: A member of a school board of an urban district,
OFFICERS: who is elected secretary or treasurer
COMPENSATION: of the board, is prohibited from receiving
SCHOOL DISTRICTS: compensation for services as secretary or treasurer.

OPINION NO. 340

November 4, 1974



Dr. Arthur L. Mallory
Commissioner of Education
Sixth Floor, Jefferson State Office Building
Jefferson City, Missouri 65101

Dear Dr. Mallory:

This is in response to your request for an opinion from this office as follows:

"Is the treasurer or secretary of an urban school district prohibited from receiving compensation for serving as treasurer or secretary of the district if he is also a member of the board of directors of said urban school district?

"The present treasurer of the School District of Kansas City, Missouri, an urban school district within the definition as set out in Section 160.011 R.S.Mo., is also a member of the Board of Directors of the School District of Kansas City, Missouri. The Board of Directors, prior to his election as treasurer, established a salary to be paid to the individual serving as treasurer. A question has now arisen as to whether it is proper under the Missouri statutes for him to accept the compensation offered."

Section 162.461, RSMo, provides that each urban school district is a body corporate "... possessing the same corporate powers and being governed by the same general laws as other six-director school districts, except as otherwise provided by law."

Section 162.521, RSMo, provides as follows:

Dr. Arthur L. Mallory

"Within ten days after the biennial election in any urban district, the board shall meet, the duly elected members be qualified and the board organized by the election of a president, vice president, secretary and treasurer. The secretary and treasurer may or may not be members of the board. The term of office of the secretary and treasurer shall be for two years and until their successors are elected and qualified. But either of them may be removed by the board for cause." (Emphasis supplied)

Section 162.551, RSMo, provides as follows:

"The treasurer and secretary of each urban district shall receive as full compensation for their services salaries fixed by the board before their election; but no compensation shall be paid to either the secretary or treasurer while they are in default in the making, filing or publishing of their reports and settlements, as the law directs."

The question is whether a member of the school board who is elected as treasurer or secretary of the board is entitled to compensation under Section 162.551.

Since Section 162.461 provides that urban school districts possess the same corporate powers and is governed by the same general laws as other six-director school districts, except as otherwise provided by law, we must look to see what provision, if any, is made under the statute regarding the secretary and treasurer of a six-director district.

Section 162.391, RSMo Supp. 1973, provides as follows:

"No member of any board of education of a six-director district shall hold any office or employment of profit from the board while a member thereof. The secretary and treasurer if not members of the board may receive reasonable compensation for their services."

This act became effective July 1, 1974. It amended Section 162.391, RSMo, which allowed a member of the board in any

Dr. Arthur L. Mallory

district containing a city having less than twenty-five thousand inhabitants to receive reasonable compensation as secretary or treasurer of the board. Under Section 162.391 although a board member may be elected secretary or treasurer, he is prohibited from receiving any compensation for acting as secretary or treasurer of the board.

A member of a public school board is a public officer. The right of a public officer to be compensated by salary for the performance of duties imposed upon him by law does not rest upon any theory of contract, express or implied, but is purely a creature of statute. A right to compensation for discharge of official duties is purely a creature of statute, and a statute which is claimed to confer such right must be strictly construed against the officer. Felker v. Carpenter, 340 S.W.2d 696 (Mo. 1960). The Supreme Court of Missouri in Nodaway County v. Kidder, 129 S.W.2d 857, 861 (Mo. 1939), declared that a contract between an individual and a public body of which he is a member is void as against public policy:

"Appellant's alleged contract was also void as against public policy regardless of the statute. A member of an official board cannot contract with the body of which he is a member. The election by a Board of Commissioners of one of its own members to the office of clerk and agreement to pay him a salary was held void as against public policy. Town of Carolina Beach v. Mintz, 212 N.C. 578, 194 S.E. 309; 46 C.J. 1037 Sec. 308."

Although this does not apply if compensation is allowed by statute, it does indicate the fundamental principles of law that generally apply to public officials as distinguished from private individuals.

In determining the meaning in application of statute, the duty of the court is to determine the legislative intent, taking the words used in their plain or ordinary and usual sense. State v. Brady, 472 S.W.2d 356 (Mo. 1971).

Since the authority of an urban school board is determined by statute, the question is whether Section 162.391 or Section 162.551 applies when a member of the school board is elected secretary or treasurer of the board in urban school districts. In determining this matter, the rules of statutory construction that the primary purpose is to determine the intent of the legislature and that statutes providing for compensation to public officials are to be strictly construed against the officers, it

Dr. Arthur L. Mallory

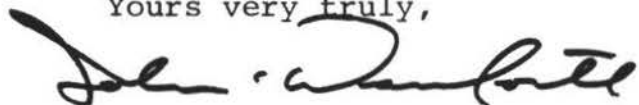
is our view that Section 162.391 is controlling when a member of the board of a urban district is elected secretary or treasurer. Section 162.521 provides that a member of the board may be elected secretary or treasurer, but it does not expressly say that he is to be compensated for such service. Section 162.551 does provide that the treasurer and secretary of an urban district shall receive full compensation for their services, but it does not expressly state that this applies when a member of the board is elected secretary or treasurer. Section 162.391 provides that a member of the board may be elected secretary or treasurer of a six-director district but expressly provides that if he is a member of the board he is not to receive any compensation for his services as secretary or treasurer. It is our view that these statutes are not in conflict and that the intent of the legislature in enacting these statutes did not intend for a school board member, who acts as secretary or treasurer of the board, to receive compensation for such services.

CONCLUSION

It is the opinion of this office that a member of a school board of an urban district, who is elected secretary or treasurer of the board, is prohibited from receiving compensation for services as secretary or treasurer.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Yours very truly,



JOHN C. DANFORTH
Attorney General

December 5, 1974

OPINION LETTER NO. 341

Answer by Letter - Klaffenbach

Honorable Bud Fendler
State Representative, District 104
527 Hoffmeister
St. Louis, Missouri 63125



Dear Representative Fendler:

This letter is in response to your question asking whether board members of a fire protection district have the authority to use tax district revenue to pay premiums on liability insurance to protect themselves against damage suits.

There is no statutory authority for board members to purchase liability insurance to protect themselves against damage suits. Such insurance cannot be provided on the basis that it constitutes additional compensation for such board members because such members maximum compensation is fixed under Section 321.190, RSMo Supp. 1973, and because such directors do not have authority to increase their compensation except within the limits of that statute. We assume therefore that the question does not assume that insurance is to be provided such members on the theory of additional compensation.

We are aware of cases such as People v. Standard Accident Insurance Co., 103 P.2d 923 (Calif. 1941), which hold that the purchase of such insurance by a public body is justified on the basis that such purchase is for a public purpose. It is our view that such holdings minority holdings which would not be followed by the Missouri courts.

We conclude that such directors do not have authority to use public money to purchase liability insurance to protect themselves.

Very truly yours,

JOHN C. DANFORTH
Attorney General



OFFICES OF THE

JOHN C. DANFORTH
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

November 27, 1974

OPINION LETTER NO. 342

Honorable Bud Fendler
Representative, District 104
527 Hoffmeister
St. Louis, Missouri 63125

Dear Representative Fendler:

This is in response to your request for an opinion from this office as follows:

"A large sum of money is laying dormant in a bank, and was the direct result of a bond issue for the construction of new engine houses, remodeling of existing houses, and the purchase of new equipment, and will not be used for the next few years. Can a transfer of funds be made from the bond issue money to an operating fund by the Mehlville Fire District Board? This money would then be replaced within 60 or 90 days. In that time, the transferred money would be used as general revenue money, covering every day operating expenses. If this transaction is possible, would it is necessary to return the original bond issue money with interest at the current rate, or an interest rate to cover the lost interest-on-savings amount? Or can the money be returned, interest free? Is there any possible way to use the bond issue money, on a loan basis, for a definite period of time with repayment determined prior to withdrawal?

"The Mehlville Fire District has to make a loan (\$250,000.) this money has to be put in

Honorable Bud Fendler

"their general revenue to pay their last quarters expenses, Oct. Nov. & Dec. They have \$500,000.00 in a bank drawing 6% interest. This money was collected from a bond issue and will remain there for a few years. The loan will cost them 12% interest. Can they transfer these funds?"

As we understand your question, it involves money derived by the Mehlville Fire District from the sale of bonds issued for the construction of a new engine house, remodeling of existing houses, and the purchase of new equipment. You inquire whether these funds may be used for operating funds by the Mehlville Fire District Board for current operating expenses.

Section 108.180, RSMo, provides as follows:

"When any bonds shall have been issued by any county, city, incorporated town or village, school district, or other political corporation or subdivision of the state, as provided under the constitution and laws of this state for the incurring of indebtedness, or for refunding, extending, unifying the whole or any part of their valid bonded indebtedness, the proceeds from the sale thereof and all moneys derived by tax levy, or otherwise, for interest and sinking fund provided for the payment of such bonds, shall be kept separate and apart from all other funds of such governmental unit, so that there shall be no commingling of such funds with any other funds of such county, city, incorporated town or village, school district, or other political corporation or subdivision of the state; provided, that in no case shall the proceeds derived from the sale of any such bonds be used for any purpose other than that for which such bonds were issued, nor shall such interest and sinking fund be used for any purpose other than to meet the interest and principal of such bonds; provided further, that any bonds or money remaining in the interest and sinking fund of any such county, city, incorporated town or village, school district, or other political corporation or subdivision

Honorable Bud Fendler

of the state, after the extinction of the indebtedness for which such bonds were issued, shall be paid into the general revenue fund of such county, city, incorporated town or village, or other political corporation or subdivision, and into the building fund of such school district."

It is the opinion of this office that under the above statute funds derived from the sale of fire protection district bonds together with proceeds of taxes collected are required to be deposited in a special fund separate and apart from general revenue funds of the district and cannot be used for any purpose other than the purpose for which the bonds were issued or to meet the interest and principal of such bonds.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

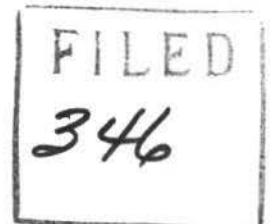
JOHN C. DANFORTH
Attorney General

MORTGAGES: When a deed of trust or mortgage is filed
DEED OF TRUST: for record in a second class county to
RECORDER OF DEEDS: secure the payment of a guaranty in writ-
ing as described herein such guaranty shall
be presented to the recorder of deeds who shall stamp or write upon
such written guaranty an identification thereof as being instruments
described in such mortgage or deed of trust, and in certifying the
releases, the recorder shall certify that such identified instru-
ments were produced and canceled.

OPINION NO. 346

November 13, 1974

Honorable Charles LeCompte
Prosecuting Attorney
Greene County Courthouse
940 Boonville Avenue
Springfield, Missouri 65802



Dear Mr. LeCompte:

This is in response to your request for an opinion from this
office as follows:

"Under the optional 'identification'
provisions of V.A.M.S. 443.040 and the man-
datory 'identification' provisions of V.A.M.S.
443.050 is a Recorder of Deeds obliged to
identify a guaranty as the instrument se-
cured by a deed of trust in the case of a
deed of trust designed and drafted to secure
a guaranty such as the deed of trust and
guaranty forms attached as exhibited and
what means should be used to satisfy the
note production and cancellation provisions
of V.A.M.S. 443.060.

"A lender has submitted a deed of trust
to secure guaranty to the Greene County Re-
corder of Deeds for recordation and tendered
the guaranty for identification. The lender
respectfully insists that the guaranty be
identified and the Recorder of Deeds has
declined to do so upon his construction of
the law and the confirming opinion of this
office. The lender advises that it has

Honorable Charles LeCompte

caused such guaranties to be identified in many Missouri counties and has procured full title insurance as to many of those transaction."

You refer specifically to Sections 443.040, 443.050, and 443.060.

Greene County is a second class county and the provisions of Section 443.050, RSMo, apply.

Section 443.050, RSMo, provides in part as follows:

"1. In all cities in this state which now have or may hereafter have six hundred thousand inhabitants or more, and in all counties of class one and two, when any mortgage or deed of trust or other instrument intended to create a lien upon real estate to secure the payment of a debt or obligation evidenced by an instrument or instruments in writing, shall be filed for record, the instrument or instruments representing the principal of such debt or obligation or any part thereof shall be presented to the recorder of deeds at the time of such filing for record, or in case the mortgage or deed of trust or other instrument is to be filed in more than one county, then to the recorder of the county where first filed, and the recorder shall, for the compensation of twenty-five cents for each of the first four of such instruments identified by him and ten cents for each additional instrument identified by him, stamp or write upon each such instrument evidencing principal so secured an identification thereof as being a note, bond or other evidence of debt described by such mortgage, deed or trust or other instrument of security.

"2. The identification may be in the following form:

This note described in instrument bearing serial number filed for record this day of, 19..., was

Honorable Charles LeCompte

presented to me and is identified as one of the instruments described in and secured by said deed of trust.

"3. In certifying to releases where the secured instruments have been so identified, the recorder shall certify that such identified instruments were produced and canceled." (Emphasis supplied)

You submit a copy of what is referred to as guaranty which you state was presented to the recorder of deeds of Greene County for identification together with the mortgage or deed of trust as security for the same. The guaranty to which you refer provides in part as follows:

"The undersigned hereby requests Bank to give, and continue to give, _____

(herein called 'Debtor') from time as Bank may see fit, financial accommodations and credit and, in consideration thereof, whether the same has been heretofore given or may hereafter be given by Bank to Debtor, the undersigned hereby guarantees and promises and agrees to make prompt payment to Bank, as they severally mature, of all overdrafts of Debtor, of all loans made or which may be made by Bank to Debtor, of all moneys paid by Bank for the use or account of Debtor and of all notes, acceptances and other paper which have been or may be discounted for, or at the request of, Debtor, whether made, drawn, accepted, endorsed or not endorsed by Debtor, and whether endorsed with or without recourse, and of any and all other obligations, of every kind and character, now due or which may hereafter become due from Debtor to Bank, howsoever created, arising or evidenced, and also of any and all renewals or extensions of any of the foregoing (all herein called 'Liabilities') regardless of any collateral now held by Bank, or which Bank may hereafter acquire, as security to any or all of the Liabilities of Debtor."

Honorable Charles LeCompte

You further state that it is secured by a deed of trust of even date covering certain real estate in Greene County, Missouri.

Under Section 443.050, in counties of class one and two on any mortgage or deed of trust or other instrument intended to create a lien upon real estate to secure the payment of a debt or obligation evidenced by an instrument or instruments in writing is filed for record, instrument or instruments representing the principal of such debt or obligation shall be presented to the recorder of deeds and the recorder shall stamp or write upon each such instrument evidencing principal so secured and identification thereof as being a note, bond, or other evidence of debt described by such mortgage or deed of trust. This statute further provides that in certifying to releases where the secured instruments have been so identified, the recorder shall certify that such identified instruments were produced and canceled.

In Webster's Seventh New Collegiate Dictionary, 1967, obligation is defined as follows:

"1: an act of obligating oneself to a course of action 2a (1): an obligating factor that binds one to a course of action (2): the power in such a factor b: a bond with a condition annexed and a penalty for nonfulfillment; broadly: a formal and binding agreement or acknowledgment of a liability c: an investment security 3: something that one is bound to do: DUTY 4: INDEBTEDNESS 5: money committed to a particular purpose: LIABILITY"

In Commerce Trust Company v. Howard, 429 S.W.2d 702 (Mo. 1968), the judgment against a defendant on a guaranty who had executed a guaranty identical to the one under consideration was upheld by the court.

It is our opinion that the guaranty described in this opinion request comes within the provisions of Section 443.050 as an instrument or instruments representing the principal of such debt or obligation described in the deed of trust which are required to be presented to the recorder for identification and it is the recorder's duty to so identify the instruments.

CONCLUSION

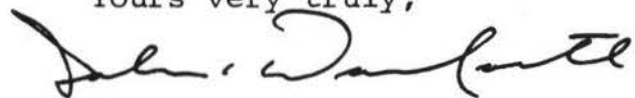
It is the opinion of this office that when a deed of trust or mortgage is filed for record in a second class county to secure

Honorable Charles LeCompte

the payment of a guaranty in writing as described herein such guaranty shall be presented to the recorder of deeds who shall stamp or write upon such written guaranty an identification thereof as being instruments described in such mortgage or deed of trust, and in certifying the releases, the recorder shall certify that such identified instruments were produced and canceled.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

October 31, 1974

OPINION LETTER NO. 347

Dr. Arthur L. Mallory
Commissioner, Department of
Elementary & Secondary Education
Sixth Floor, Jefferson Building
Jefferson City, Missouri 65101

Dear Dr. Mallory:

This letter is in response to your question asking:

"May the individual who holds the position of Secretary of the School Board of the School District of Kansas City, an urban school district, receive an additional appointment as an assistant to the Superintendent of the District with compensation for the second position to be approximately \$195.00 per month in addition to the salary previously established for the office of Board Secretary?"

You also state that:

"The incumbent Board Secretary of the Kansas City District is being paid a salary of \$19,250 per year established prior to his appointment in February of 1974. The Board has under consideration the possibility of appointing the Secretary as an assistant to the Superintendent to perform such administrative tasks as the Superintendent might require at an additional salary of \$195.00 per month, there being no indication in the Secretary's appointment that his full time is required for the office of Secretary.

..."

Dr. Arthur L. Mallory

It is also our understanding that the board secretary is not a member of the board.

Section 162.531, RSMo, provides:

"The secretary of the board of each urban district shall keep a record of the proceedings of the board; he shall also keep a record of all warrants drawn upon the treasurer, showing the date and amount of each, in whose favor and upon what account it was drawn, and shall also keep a register of the bonded indebtedness of the school district; he shall also perform other duties required of him by the board, and shall safely keep all bonds or other papers entrusted to his care. He shall, before entering upon his duties, execute a bond to the school district in the penal sum of not less than five thousand dollars, the amount thereof to be fixed by the board, with at least two sureties, to be approved by the board." (Emphasis added).

Section 162.551, RSMo, provides:

"The treasurer and secretary of each urban district shall receive as full compensation for their services salaries fixed by the board before their election; but no compensation shall be paid to either the secretary or treasurer while they are in default in the making, filing or publishing of their reports and settlements, as the law directs." (Emphasis added).

It is our view that the answer to your question depends largely upon whether a new position is to be filled by the secretary or whether the secretary is being assigned additional duties under Section 162.531. If the secretary is required to perform additional duties as secretary under Section 162.531 he could not receive additional compensation because his compensation is to be fixed under Section 162.551 before his election to office and he is required by law to perform other duties required of him by the board in addition to the specific duties set out by statute.

If, on the other hand, the secretary is to fill a distinctly different position in the absence of any requirement that the

Dr. Arthur L. Mallory

secretary serve full time and in the absence of any conflict or incompatibility of positions or duties, the secretary could be employed in such other capacity. State ex rel. Walker v. Bus, 36 S.W. 636 (Mo. 1896).

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General



OFFICES OF THE

JOHN C. DANFORTH
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

December 5, 1974

OPINION LETTER NO. 348

Mr. James R. Spradling
Director of Revenue
Department of Revenue
Room 401, Jefferson State Office Building
Jefferson City, Missouri 65101

Dear Mr. Spradling:

This is in response to your request for an opinion as to whether or not the Motor Vehicle Division and the Driver's License Division of the Department of Revenue are subject to the requirements of the Federal Fair Credit Reporting Act.

As stated in your request, these divisions are responsible for enforcing Chapters 301, 302, and 303 of the Missouri Revised Statutes, said sections dealing with motor vehicle registration and licensing, drivers' licenses, and the Safety Responsibility Act. In accordance with these duties, complete records are maintained by the Department of Revenue on every licensee or motor vehicle owner. These records reveal each licensee's entire driving record, including any conviction for traffic offenses. Pursuant to statute, these records are available for public inspection by any person. See Sections 109.180, 301.350, and 303.300, RSMo 1969, and Section 610.025, RSMo Supp. 1973. However, the department does charge a fee of one dollar to all persons except an individual who is checking his own records to help defray the expense to the state of producing such records for inspection and reproducing them if such is desired.

The Federal Fair Credit Reporting Act, 15 U.S.C. 1681 et seq., requires that "consumer reporting agencies" furnish "consumer reports" only for specified purposes to specified persons. A "consumer reporting agency" is defined as:

" . . . any person which, for monetary fees, dues, or on a cooperative nonprofit basis,

Mr. James R. Spradling

regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports."

The term "person" is defined to include "government or governmental subdivision or agency, or other entity." The term "consumer report" is defined, with certain exceptions, to mean:

". . . any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living . . ."

Such a report must be used or expected to be used or collected to serve as a factor in establishing the consumer's eligibility for credit or insurance for personal or family purposes, employment purposes, or other authorized purposes. In addition, the act forbids the disclosure of certain information in "consumer reports" after the lapse of various periods of time, 15 U.S.C. 1681c; and the act requires prospective users of information to certify the purpose for which the information will be used, 15 U.S.C. 1681e.

The Federal Fair Credit Reporting Act is to be enforced by the Federal Trade Commission with respect to consumer reporting agencies and all other persons subject thereto. See 15 U.S.C. 1681s. In enforcing the act, the Federal Trade Commission has the authority to issue rules and interpretations, but such interpretations are not substantive in nature and do not have the force and effect of statutory provisions. See 16 C.F.R. §§ 1.71 through 1.73. The Federal Trade Commission has adopted an interpretation holding that motor vehicle reports as compiled by state departments of motor vehicles are "consumer reports" and that the departments are "consumer reporting agencies" with respect to driver's license information which is sold to insurance companies or other businesses and which has a bearing upon an individual's credit rating. See 16 C.F.R. §600.4.

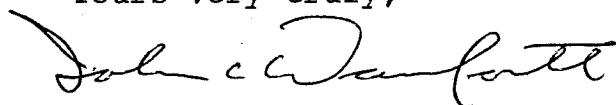
If the Federal Trade Commission's interpretation were to be accorded the effect of law, the supremacy clause of the

Mr. James R. Spradling

United States Constitution would prevent further inquiry; any state legislation conflicting with federal law must give way where the federal law regulates an area within the federal sphere of control. See article VI, clause 2, United States Constitution. However, since the Federal Trade Commission's interpretation does not have the effect of law, we are free to examine the Federal Fair Credit Reporting Act and to make a determination whether the activities of the Department of Revenue are such as to constitute them a "consumer reporting agency" within the terms of the act.

In our opinion, the Department of Revenue is not a "consumer reporting agency." The Federal Trade Commission's interpretation that a state department of motor vehicles is such an agency dwells heavily upon the fact that the information compiled by such agencies can have a direct effect upon a consumer's credit rating or eligibility for insurance. Although this may be true, this is not a proper criteria for determining whether or not a state agency is a "consumer reporting agency" within the meaning of the act. 15 U.S.C. 1681a(f) defines a "consumer reporting agency" as someone who regularly engages in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties. It seems obvious that the activities of the Department of Revenue do not fall within this purpose. Rather, complete records on drivers in this state are kept for the purpose of promoting highway safety and regulating the use of our highways, functions which lie within the general police power of any state.

Yours very truly,



JOHN C. DANFORTH
Attorney General



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

JOHN C. DANFORTH
ATTORNEY GENERAL

November 7, 1974

OPINION LETTER NO. 349
Answer by Letter - Nowotny

Mr. Robert L. James
Commissioner of Administration
State Capitol Building - Room 125
Jefferson City, Missouri 65101



Dear Mr. James:

This is in reply to your request for an opinion of this office on the following question:

"Does the Commissioner of Administration, with the concurrence of the Committee on State Fiscal Affairs, have the authority to charge expenditures for the purpose of the appropriations in Section 6.340 against funds appropriated in Sections 6.230, 6,290 or 6.300 of C.C.S.H.B. 1006, 77th General Assembly?"

Section 6.340 provides as follows:

"To the Department of Social Services For the Division of Family Services For supplementation payments to the aged, blind, or disabled persons as provided by law From General Revenue	\$22,000,000
Total.	\$23,350,000"

Section 6.230 provides as follows:

"To the Department of Social Services For the Division of Family Services For Aid to Dependent Children From General Revenue	\$44,676,816"
---	---------------

Section 6.290 provides as follows:

"To the Department of Social Services
For the Division of Family Services
For aid or relief in case of public
calamity, and for direct relief
to unemployable persons
From General Revenue \$11,310,000"

Section 6.300 provides as follows:

"To the Department of Social Services
For the Division of Family Services
For benefits under Title XIX of the
Social Security Act as provided
by law
From General Revenue "51,409,625"

The law is clear that moneys appropriated for one purpose cannot be expended for any other purpose. Article IV, Section 28, Constitution of Missouri; and see State ex rel. Cason v. Bond, 495 S.W.2d 385 (Mo. Banc 1973). We have consistently so held in Opinions No. 45, April 21, 1953, James; No. 19, September 2, 1953, Cooper; No. 15, November 29, 1955, Carter; No. 62, October 21, 1957, Millett; No. 414, December 13, 1963 Rabbitt; and No. 152, March 27, 1974, Sikes (copies enclosed).

Therefore, to answer your question we must first examine the purposes of the appropriations in Sections 6.230, 6.300 and 6.290 to determine if any of these purposes include the purpose of the appropriation in Section 6.340. If so, then it follows that the concurrence of the Committee on State Fiscal Affairs is not required for the Commissioner of Administration would have final authority to so expend such moneys for the purpose for which it had been appropriated. Article IV, Section 28, Constitution of Missouri; Chapter 33, RSMo.

Section 6.340 then is for "supplementation payments to the aged, blind, or disabled persons as provided by law." It is our opinion that such payments "as provided by law" are those provided in Section 208.030, RSMo Cum. Supp. 1973, which provides for "supplemental security income" for the aged, blind or totally disabled. The appropriation in Section 6.340 then is for a very specific program purpose.

As shown by the quotation of Section 6.230, it is obvious that this appropriation for aid to dependent children does not encompass the purpose of "supplemental payments to the aged, blind or disabled persons." Dependent children simply are not included in the general meaning of the words "aged, blind or disabled persons." In addition, the appropriation for aid to dependent children is also a specific program purpose provided for in Section 208.040, RSMo Cum. Supp. 1973. Therefore, it is our opinion that the moneys appropriated in Section 6.230 cannot be expended for supplementation payments to the aged, blind or disabled.

Section 6.300, as quoted above, is for benefits under Title XIX of the Social Security Act "as provided by law." Again, we find that the legislature has specifically provided by law for state assistance in conjunction with this federal program for providing certain medical assistance. Section 208.151, RSMo Cum. Supp. 1973. Thus, again it is our opinion that the moneys appropriated in Section 6.300 are for the specific program purpose of Section 208.151, and do not include the purpose of supplementation payments to the aged, blind or disabled.

Section 6.290, as quoted, is an appropriation for aid or relief in case of public calamity or direct relief to unemployable persons. Again, we find that the legislature has specifically provided by general legislation for programs of aid in cases of public calamity and aid to unemployable persons. Sections 208.150(2), 208.060(2), 208.160(3), 208.170.2(3) and (5), and 207.010, RSMo Cum. Supp. 1973. Therefore, we again conclude that the moneys appropriated in Section 6.290 are for purposes that do not include supplementation payments to the aged, blind or disabled.

Nevertheless, your question then asks if you, with the concurrence of the Committee on State Fiscal Affairs, can expend the moneys appropriated in Sections 6.230, 6.300 or 6.290 for the purpose of Section 6.340. This would obviously involve the power to transfer appropriations from one purpose to another.

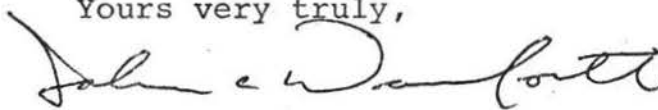
This question is precisely that answered in Opinions No. 190, April 25, 1972, Barbero and Vossmeier; No. 222, September 4, 1973, Bond; and No. 347, June 18, 1971 Cantrell (copies enclosed). For the same reasons discussed in those opinions it is our opinion there is no authority for the Commissioner of Administration, with the concurrence of the Committee on State Fiscal Affairs, to charge expenditures for the purpose of the

Mr. Robert L. James

-4-

appropriation in Section 6.340 against funds appropriated in Sections 6.230, 6.290 or 6.300 of C.C.S.H.B. 1006, 77th General Assembly.

Yours very truly,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH
Attorney General

enclosures

BONDS:
SEWERS:
COUNTIES:
COUNTY COURT:
REVENUE BONDS:

A sewer district organized by a county court of a third class county under the provisions of Sections 249.430 to 249.660, RSMo, has authority to issue revenue bonds under the provisions of Chapter 250, RSMo.

OPINION NO. 350

November 18, 1974

Honorable Gene Hilton
Prosecuting Attorney
Camden County Courthouse
Camdenton, Missouri 65020



Dear Mr. Hilton:

This opinion is in response to your question asking:

"Does a sewer district, organized in a county of the third class under Chapter 249, RSMo, have authority to issue revenue bonds under the provisions of Chapter 250, RSMo, specifically under Sections 250.010, 250.050, 250.070 and 250.080?"

You further state that:

"Section 250.010 provides that 'any sewer district organized under Chapter 249, RSMo,' is authorized to construct a sewerage system and to finance the system as further provided in Chapter 250. This provision seems to confer on any sewer district organized under Chapter 249 the powers subsequently set out in Chapter 250. Section 250.050 provides that the cost to 'any such sewer district' of constructing a sewerage system may be met from the proceeds of revenue bonds of such sewer district.

"A question arises, however, from certain language in Sections 250.070 and 250.080 referring to actions to be taken by 'the board of trustees of the district' in carrying out the procedures relating to the authorization and the issuance of bonds.

Honorable Gene Hilton

"Section 250.070 (3.) provides as follows:

In sewer districts any such election shall be called, conducted and the result thereof declared by the board of trustees of the district.... [emphasis added].

"Section 250.080 (1.) provides as follows:

Revenue bonds authorized at an election as hereinabove provided shall be issued by authority... of a resolution adopted by the board of trustees of any such district.... [emphasis added].

"The only sewer districts for which Chapter 249 provides that a board of trustees shall be the governing body are those sewer districts in St. Louis County. Sewer districts in third class counties do not have a board of trustees. Rather, Chapter 249 provides for sewer districts in third class counties to be governed by the County Court.

"Thus, the question arises: Does the above language in Sections 250.070 and 250.080 limit the power to issue revenue bonds to only those sewer districts which have a board of trustees, i.e., those in St. Louis County, or does Section 250.010 granting authority to 'any sewer district organized under chapter 249, RSMo,' control, such that any later reference in Chapter 250 to 'board of trustees' is merely intended to refer to the governing body in a general sense, and is not meant to be a limitation on which sewer districts can issue bonds?"

The provisions of Chapter 250, RSMo, to which you refer, were enacted in 1951, H.S.H.B. No. 45, 66th General Assembly. The title to such act states:

Honorable Gene Hilton

"AN ACT relating to the acquisition, construction, extension or improvement of sewerage systems by cities, towns and villages whether organized under the general law or by special charter or constitutional charter, or by sewer districts organized under Chapter 249, RSMo 1949, as that chapter now exists or may be amended: to the combination by such cities, towns, villages or sewer districts of existing sewerage systems or sewerage systems to be acquired or constructed, with existing waterworks or with waterworks to be acquired or constructed: and to the improvement and extension of such combined systems: and to issuing revenue bonds and providing means for the payment of the acquisition, construction, improvement or extension of any such sewerage system or combined sewerage and waterworks system."

Accordingly, Section 250.010, RSMo, applies expressly to ". . . any sewer district organized under chapter 249, RSMo, as that chapter now exists, or as it may be amended, . . ." and authorizes such districts "to provide funds . . . as hereinafter provided."

Section 250.050, RSMo, provides in part that:

"The cost to any such sewer district of acquiring, constructing, improving or extending a sewerage system may be met:

* * *

(4) From the proceeds of revenue bonds of such sewer district, payable solely from the revenues to be derived from the operation of such sewerage system . . ."

Section 250.060, RSMo, refers to "the board of trustees of the district" with respect to elections concerning the issuance of bonds payable from taxes. Section 250.070, RSMo, as you noted, refers to "the board of trustees of the district" with respect to elections concerning revenue bonds. Section 250.080, RSMo, as you noted, refers to the resolution required of the "board of trustees of the

Honorable Gene Hilton

district" with respect to revenue bonds authorized at an election and also provides that any such bonds shall be sold in such manner as the "board of trustees of such sewer district shall determine" as therein provided. Other provisions of Chapter 250 deal in more general terms referring to "sewer district" (Sections 250.090, 250.110, 250.120, 250.130, 250.140, 250.150, 250.160, 250.170, 250.180, 250.190, 250.200, 250.210, and 250.240) although some reference is made to "sewerage district" (Section 250.180). In some of the provisions, the governing body is referred to as "proper officials" (Section 250.150) or "officials" (Section 250.170) or "governing authority" (Section 250.180) or "governing body" (Section 250.160(7)). Admittedly, however, the broader terms are used in conjunction with references to "city, town or village" as well as "sewer district."

In addition, we note that Section 250.240, RSMo, respecting the purpose of the act provides:

"It is the purpose of this chapter to enable cities, towns and villages and sewer districts to protect the public health and welfare by preventing or abating the pollution of water and creating means for supplying wholesome water, and to these ends every such municipality and sewer district shall have the power to do all things necessary or convenient to carry out such purpose, in addition to the powers conferred in this chapter. This chapter is remedial in nature and the powers hereby granted shall be liberally construed."

If, in fact, the legislature had intended to vest the power to issue revenue bonds in only St. Louis County, which, as you noted, is the only such district that has a board of trustees, it would have been a simple thing to clearly so provide. It is our view from a full reading of these acts, including the title which we have quoted and which should be given some effect, that the legislature intended that the authority to issue such revenue bonds not be limited to a sewer district having a board of trustees but include sewer districts created by county courts under the provisions of Sections 249.430 to 249.660, RSMo. Thus, in our view, the aforementioned terminology "board of trustees" was in fact intended by the legislature to apply to the county court in such districts.

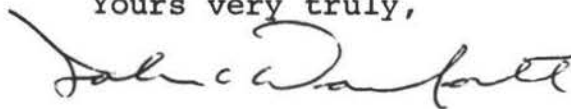
Honorable Gene Hilton

CONCLUSION

It is the opinion of this office that a sewer district organized by a county court of a third class county under the provisions of Sections 249.430 to 249.660, RSMo, has authority to issue revenue bonds under the provisions of Chapter 250, RSMo.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Klaffenbach.

Yours very truly,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH
Attorney General

COUNTY TREASURERS:
COMPENSATION:
COUNTY OFFICERS:
OFFICERS:

Section 146.056, RSMo, which requires certain duties of county treasurers with respect to the state intangible tax has been repealed by implication and such treasurers are not entitled to the additional compensation provided by Section 54.275, RSMo for such services no longer rendered by them.

OPINION NO. 351

November 8, 1974

Honorable John D. Ashcroft
State Auditor of Missouri
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Ashcroft:

This opinion is in response to your question asking:

"Will County Treasurers be entitled to the additional compensation under Section 54.275, RSMo. 1969, for the year of 1974 for the additional duties imposed upon them by Section 146.056, RSMo. 1969? Is it required that the County Treasurer forward to the Director of Revenue a list of the additional names as mentioned in 146.056, RSMo. 1969 even though this list will not have value because 1974 is the last year for collection of the intangible tax?

"If this list is not required what specifically must be done by the Treasurer to receive compensation pursuant to 54.275?"

You also state that:

"Section 54.275, RSMo. 1969 provides that County Treasurers shall receive additional compensation for the duties imposed upon them by Section 146.056, RSMo. 1969. However, this Section also provides the Treasurer shall use diligence in securing and preparing the list of additional persons to whom he has

Honorable John D. Ashcroft

sent intangible tax forms. The Revenue Department uses this list to prepare address labels for the next year's intangible tax forms which are sent out.

"According to Attorney General's Opinion No. 308-1973, Spradling, the year 1974 is the last year which a liability can be incurred for the intangible tax, but the liability is based upon the yield of intangible personal property during 1973, and therefore the final date for filing intangible tax returns will be April 15, 1974."

The legislative history of the repeal of the intangible tax law is rather complex. House Bill No. 537 was introduced in the 76th General Assembly, Second Regular Session, with the apparent intent to amend the laws but not to repeal them. Various changes were made in such bill during its journey through the legislative processes and as finally passed and approved, C.C.S.H.B. No. 537 ultimately had the effect of repealing Sections 146.010, 146.020, 146.030, 146.050, 146.080 and 146.120, RSMo 1969, all relating to the tax on intangible personal property. Before the effective date of the repeal, January 1, 1975, Senate Bill No. 254 of the 77th General Assembly, First Regular Session, amended Section 146.010, RSMo 1969, by repealing such section and enacting a new section in lieu thereof designated as Section 146.011, which latter section expressly terminates December 31, 1974, and at the same time repealed Sections 146.020, 146.030, 146.080 and 146.120, RSMo 1969 and 146.050, RSMo Supp. 1971, as of January 1, 1975. The end effect was similar to that of House Bill No. 537.

It is not clear why certain sections of Chapter 146 were not repealed. Among those sections not repealed are Section 146.055, RSMo 1969, which requires the Director of Revenue to furnish tax forms to county treasurers, and Section 146.056, RSMo, which requires county treasurers to mail tax forms to intangible taxpayers. It is somewhat easier to understand why the separate section, Section 54.275, RSMo, providing for compensation for the county treasurer for the duties performed, was overlooked.

It is our view that the duties required by the above sections relative to the intangible tax law, which no longer serve any purpose in view of the repeal of the law, are repealed by implication.

Therefore, the conclusion we reached in our Opinion No. 75, dated April 16, 1953, to Riley, is applicable. In that opinion,

Honorable John D. Ashcroft

copy enclosed, this office held that a repeal of Section 146.056 would make it obvious that the removal of the duties would necessarily eliminate the additional compensation provided for such duties, and, as a result, the treasurer would not be entitled to the compensation provided for performance.

It is our view that the 1953 opinion is applicable in these premises and that the treasurers would be paid for 1974 because services have already been performed for that year but not thereafter.

CONCLUSION

It is the opinion of this office that Section 146.056, RSMo, which requires certain duties of county treasurers with respect to the state intangible tax has been repealed by implication and that such treasurers are not entitled to the additional compensation provided by Section 54.275, RSMo for such services no longer rendered by them.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 75
4/16/53, Riley



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

December 17, 1974

OPINION LETTER NO. 353

Missouri Commission on Human Rights
Post Office Box 1129
Jefferson City, Missouri 65101

To the Commission:

In response to your request for an opinion concerning the obligation of the Missouri Commission on Human Rights to prepare a record and transcribe testimony at its public hearings, we have examined the opinion of your then deputy director and concur in the conclusions therein reached. Those conclusions are consistent with the recent case of Sullivan County v. State Tax Commission, 513 S.W.2d 452 (Mo. 1974), which provides general guidelines for situations when an agency is not expressly required to prepare transcripts.

With respect to your opinion request, we expressly agree that:

1. The Missouri Commission on Human Rights is required to record and transcribe testimony taken at hearings held pursuant to Chapters 296 and 314, RSMo 1969, but testimony may be mechanically recorded and later transcribed by the Commission staff.
2. With respect to hearings conducted pursuant to Chapter 213, the Commission is not required to transcribe testimony presented at such hearing absent a request from one of the parties to the hearing.
3. With respect to hearings conducted pursuant to Chapters 296 and 314, costs of recording and transcribing testimony at such hearings is the responsibility of the Commission, but the Commission is not liable for the cost of preparing transcripts of testimony taken at hearings pursuant to Chapter 213.

Missouri Commission on Human Rights

4. Even though an appeal is taken from the Commission to the circuit court, the Commission is not required to have the transcript prepared at the time the appeal is filed since Supreme Court Rule 100.06 and Section 536.130, RSMo 1969, provide for the filing of the administrative record with the court after the filing of the appeal.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

December 30, 1974

OPINION LETTER NO. 355

Answer by Letter - Rothschild

Honorable Morris G. Westfall
Representative, District 133
House Post Office
Capitol Building
Jefferson City, Missouri 65101

Dear Representative Westfall:

This is in response to your question as stated:

"Is it constitutional for the Missouri Highway Commission and in turn the Missouri Highway Department to interpret the billboard laws for the State of Missouri in such a manner as to require a permit for church billboards that issue a welcome to town and give direction for location of church. To phrase the question another way, is it constitutional to require the church to remove any sign as long as they have the permission of the owner of the property on which the signs stands."

We assume that your question is whether it violates the Constitution for the Highway Beautification Act (Sections 226.500, RSMo, et seq.), and regulations promulgated pursuant thereto, to be enforced against a church. We further assume that you are not questioning the validity of the act in general, but simply its application to a religious institution. Therefore, it is assumed that you are asking whether religious institutions enjoy some immunity to the normal application of this law, as provided by the state or federal constitution.

The Supreme Court of the United States discussed a very similar situation in Cox v. New Hampshire, 312 U.S. 569 (1941). In that case, several Jehovah's Witnesses claimed many of their fundamental rights, including the

Morris G. Westfall

freedom of worship and freedom of speech, were violated by a state statute which prohibited a "parade or procession" upon a public street without a special license. In affirming the decision of the Supreme Court of New Hampshire, which upheld the statute, the Supreme Court stated, at Page 574:

"Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need. Where a restriction of the use of highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection. One would not be justified in ignoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command or sought by that means to direct public attention to an announcement of his opinions. As regulation of the use of the streets for parades and processions is a traditional exercise of control by local government, the question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorably associated with resort to public places. Lovell v. Griffin, 303 U.S. 444, 451; Hague v. Committee for Industrial Organization, 307 U.S. 496, 515, 516; Schneider v. State, 308 U.S. 147, 160; Cantwell v. Connecticut, 310 U.S. 296, 306, 307."

Morris G. Westfall

In addition, the court concluded, at Page 578:

"The argument as to freedom of worship is also beside the point. No interference with religious worship or the practice of religion in any proper sense is shown, but only the exercise of local control over the use of streets for parades and processions."

This view has been reiterated by the United States District Court for the Western District of Missouri in the case of Mickey v. Kansas City, Mo., 43 F.Supp. 739 (W.D.Mo. 1942). In that case, the court upheld several ordinances of the City of Kansas City against the attack that they violated the constitutional rights of several Jehovah's Witnesses, including the freedom of worship. See also Commonwealth v. Pascone, 33 N.E.2d 522, 525 (Mass. 1941), where a similar challenge to a city ordinance was rejected. The court stated:

"No automatic exemption from the requirements of the statute arises on constitutional grounds from the fact that the merchandise sold consisted of pamphlets of a religious nature. Neither the press nor religion, fundamental as both are in the political and social policy of this country, can claim in all relations, at all times, and in all places absolute freedom from reasonable regulation. One could not claim a constitutional right to continued, exclusive occupation of a particular area of a public street for the purpose of maintaining there a book store for the sale of religious books. The infringement upon the public right is the same whether the articles sold are religious pamphlets or other portable articles of merchandise. The statute is not a general and indiscriminating attack upon a commonly harmless means of communicating ideas and therefore an unnecessary and unwarranted interference with a constitutionally protected liberty, as the ordinance in the first case might be thought to be. The statute aims at a particular evil and endeavors to remedy it by specific means appropriate to that end. It goes no further

Morris G. Westfall

than is required to curb the evil. If in some few instances it may affect in some degree the press and religion, its interference with them is incidental only and no greater than or different in quality from that to which constitutional liberties are frequently and unavoidably subject from necessary police regulations. . . . "

Therefore, it is our view that, if Sections 226.500, RSMo, et seq., are otherwise valid (and we do not answer this question in this opinion), then it may be applied to religious institutions as it would be applied to other individuals or entities.

Very truly yours,

JOHN C. DANFORTH
Attorney General

December 30, 1974

OPINION LETTER NO. 372
Answer by Letter - Klaffenbach

Honorable Donald L. Manford
Missouri Senate, 8th District
425 State Capitol Building
Jefferson City, Missouri 65101



Dear Senator Manford:

This letter is in response to your questions asking:

"(1) Is the new campaign reform law enacted by a referendum vote, applicable to primary and general election campaigns for city councilmen and mayors?

"(2) Are the spending limitations set forth in said new law also applicable to such candidates?"

Proposition No. 1, proposed by the initiative petition, respecting campaign financing and election practices was adopted by the voters at the last general election and by its terms becomes effective January 1, 1975, (Section 19).

The Missouri Elections Commission composed of six members is created and established by such initiated law, (Section 11). The Commission is given the duty of administering such law, (Section 12). The initiated law contemplates the appointment of attorneys by the Commission, (Sections 11, 12 and 13). Subsection 2 of Section 13 empowers and requires the Missouri Elections Commission to issue advisory opinions. Such subsection provides as follows:

"The commission is empowered to:

★ ★ ★

Honorable Donald L. Manford

"Issue, upon request, and publish advisory opinions upon the requirements of this act, based on a real or hypothetical set of circumstances."

It is our view that, in the absence of exceptional circumstances, this office should defer to the explicit authority given to the Commission to issue interpretations "upon the requirements of this act". While the Commission has not as yet been chosen it seems clear that the Commission is required to be chosen soon and that your question can then be appropriately addressed to such body under the provisions of subsection 2 of Section 13.

For the above reason we do not believe that your questions should be answered by an opinion of this office under Section 27.040, RSMo. We therefore respectfully decline to render an opinion on such questions.

Very truly yours,

JOHN C. DANFORTH
Attorney General



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

December 9, 1974

JOHN C. DANFORTH
ATTORNEY GENERAL

OPINION LETTER NO. 373

Honorable John A. Sharp
Representative, District 38
% House Post Office
State Capitol Building
Jefferson City, Missouri 65101

Dear Representative Sharp:

This letter is in response to your question asking:

"Is Section 26.17 of the Kansas City Code which requires convicted felons to register with the Kansas City chief of police within 24 hours after arriving in the city constitutional?"

"Is such an ordinance prohibited by any present state law?"

In Lambert v. California, 355 U.S. 225, 2 L.Ed.2d 228, 78 S.Ct. 240 (1957), the United States Supreme Court held a registration ordinance unconstitutional as a violation of due process as applied to the plaintiff therein because the city failed to prove that the felon had knowledge of the registration requirement or that there was any probability of such knowledge.

The ordinance in question provides that the person who "knowingly" violates the registration requirement is guilty of a misdemeanor and, therefore, does not suffer the constitutional infirmity found to exist in the Lambert case.

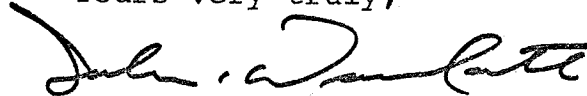
We are of the view that such an ordinance is constitutional.

We find no state law prohibiting such an ordinance.

Honorable John A. Sharp

We enclose a copy of the opinion of the Supreme Court of the United States in the Lambert case.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

Enclosure



OFFICES OF THE

JOHN C. DANFORTH
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

November 25, 1974

OPINION LETTER NO. 376

Honorable William S. Brandom
Prosecuting Attorney
Clay County, Court House
Liberty, Missouri 64068

Dear Mr. Brandom:

This letter is issued in response to your request for a ruling on the following question:

"Is the Sales Tax Division of the Missouri Department of Revenue exempt from paying the Recorder of Deeds of Clay County, Missouri the required fees for Sales Tax liens and releases?"

The question has recently been resolved by the ruling of the Circuit Court of Cass County, Missouri, in the case of State of Missouri ex rel. James R. Spradling v. Mason Fall, No. 34164, on March 11, 1974. That case held that there is no statutory authority requiring the Department of Revenue to pay a fee to a county recorder of deeds for filing notice of sales tax liens pursuant to Section 144.380, RSMo 1969. The decision of the Circuit Court was not appealed.

The general rule in Missouri is that the state is not liable for the payment of court costs. Murphy v. Limpp, 147 S.W.2d 420 (Mo. 1941). Similar principles govern the instant situation. We conclude that the Department of Revenue is exempt from paying fees to the Clay County Recorder of Deeds for the filing of sales tax liens and releases.

Very truly yours,

JOHN C. DANFORTH
Attorney General

SUNSHINE LAW:
CITIES, TOWNS & VILLAGES:
CRIMINAL PROCEDURE:
POLICE COURT:
ARRESTS:

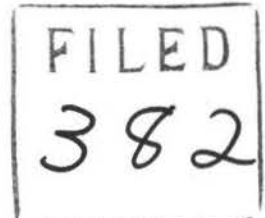
1. Section 610.100, RSMo Supp. 1973, with respect to arrest records, is applicable to arrests for ordinance violations of the City of Maplewood, if such arrests were made within the geographical boundaries of such city

or within the geographical boundaries of St. Louis County. 2. Section 610.100 is not applicable to situations in which the accused person has been given a summons which notifies him that charges are pending against him, but has not actually been arrested. 3. Section 610.100 does not require expungement of records pertaining to arrests for charges which have been amended to charge lesser offenses than those of which the person was originally accused, if the person was charged with any offense within thirty days of his arrest.

OPINION NO. 382

December 31, 1974

Honorable James N. Riley
State Representative, 88th District
7363 Goff Avenue
Richmond Heights, Missouri



Dear Representative Riley:

This official opinion is issued in response to your request for a ruling on the following questions:

"1. Is Section 610.100 applicable to ordinance violations brought before the Municipal Court of Maplewood, being a city of approximately 13,000 people within St. Louis County, being a county of over 500,000 people?

"2. If so, is Section 610.100 applicable to summons as well as arrests?

"3. If Section 610.100 is applicable to Maplewood ordinance violations does this require expungement of original charges that have been amended to some other charge?"

Section 610.100, RSMo Supp. 1973, to which your questions refer, provides as follows:

Honorable James N. Riley

"If any person is arrested and not charged with an offense against the law within thirty days of his arrest, all records of the arrest and of any detention or confinement incident thereto shall thereafter be closed records to all persons except the person arrested. If there is no conviction within one year after the records are closed, all records of the arrest and of any detention or confinement incident thereto shall be expunged in any city or county having a population of five hundred thousand or more."

The answer to your first question may be found in our Opinion No. 321, issued to Colonel Samuel S. Smith on December 10, 1973. A copy of that opinion is enclosed. We held there that the first sentence of Section 610.100 applies throughout the State of Missouri, and that the second sentence of Section 610.100 applies if the arrest giving rise to the case took place within the geographical confines of either a city or a county having a population of 500,000 or more. All arrests for municipal ordinance violations of the City of Maplewood which take place within the geographical area of St. Louis County (in which the City of Maplewood is located) will therefore be subject to the provisions of Section 610.100, since St. Louis County is a county which fits within the above description.

With respect to your second question, you have stated the following:

"A number of municipal charges are the result of the issuance of either a Uniform Traffic Ticket or of a summons which may or may not constitute an arrest depending upon the factual situation. Assuming the particular situation does not constitute an arrest it is merely a notice procedure via a summons. My question is whether or not these situations would fall within the particular section."

We are of the opinion that the term "arrest" in Section 610.100 does not refer to the situation in which a person is merely served with a summons as notice of a charge. In Missouri Public Service Company v. Platte-Clay Electric Cooperative, Inc., 407 S.W.2d 883, 891 (Mo. 1966), it was stated that

Honorable James N. Riley

". . . We are enjoined by §1.090 to take words and phrases in their plain or ordinary and usual sense. In *Marty v. State Tax Commission of Missouri*, Mo.Sup., 336 S.W.2d 696, we approved the rule that the legislative intent should be ascertained from the words used, if possible, and that the plain and rational meaning of language should be ascribed to it. . . ."

We do not believe that any situation which does not constitute an arrest, in the plain and ordinary meaning of that term, is comprehended by Section 610.100. The term "arrest" is normally understood to comprehend some form of physical detention or restraint of the person arrested, and not merely the service of notice upon him. See Section 544.180, RSMo 1969. In *Douglas v. Buder*, 412 U.S. 430, 93 S.Ct. 2199, 37 L.Ed.2d 52 (1973), the United States Supreme Court held that the issuance of a traffic citation does not constitute an arrest under Missouri law, unless the person is actually restrained or taken into custody by the officer issuing the citation.

Your third question apparently refers to the situation in which a person who is arrested is charged with one offense, but that charge is later dropped and he is actually charged with a different, lesser offense.

This question can also be answered by reference to our Opinion No. 321, *supra*. In that opinion we held that Section 610.100 requires closing of records of arrests only if the arrested person is "not charged with an offense against the law within thirty days of his arrest." The term "an offense" can refer to any offense. Therefore, neither closing nor expungement of records is required if the arrested person has been charged with any offense within thirty days of his arrest. We note, however, that your question relates to Section 610.100 rather than Section 610.105. In our Opinion No. 321, *supra*, we held that, if an information has been filed charging an offense and then a new information charging the accused with a different offense is substituted for the original information, Section 610.105 would require closing (not expungement) of records pertaining to the original charge.

CONCLUSION

Therefore, it is the opinion of this office:

Honorable James N. Riley

1. Section 610.100, RSMo Supp. 1973, with respect to arrest records, is applicable to arrests for ordinance violations of the City of Maplewood, if such arrests were made within the geographical boundaries of such city or within the geographical boundaries of St. Louis County.

2. Section 610.100 is not applicable to situations in which the accused person has been given a summons which notifies him that charges are pending against him, but has not actually been arrested.

3. Section 610.100 does not require expungement of records pertaining to arrests for charges which have been amended to charge lesser offenses than those of which the person was originally accused, if the person was charged with any offense within thirty days of his arrest.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mark D. Mittleman.

Very truly yours,

A handwritten signature in black ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 321
12/10/73, Smith